IMMIGRATION AND EDUCATION LEGISLATION AND ITS EFFECTS ON POLICIES RELATING TO UNDOCUMENTED IMMIGRANT CHILDREN

By

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DEDICATED TO:

Germaine G. Bourque Raska (1915-1991), my most wonderful Mother,
without whose spirit, inspiration and belief in me,
I would not have attempted such a monumental task.

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Abstract of Dissertation Presented to the Graduate School
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The need for an effective public policy regarding the education and assimilation of illegal immigrant children had become the topic of many discussions. Beginning with the Plyler decision in Texas in 1982, California's Proposition 187 and the Gallegly amendment in 1996, attempts were made to legislate such policy. Florida had the fourth largest percentage of illegal immigrant population in the United States. Along with that, the fourth largest number of illegal immigrant children, which we had a moral, if not legal, obligation to educate. Educating immigrant children to the ways of our society, along with English and mathematics, provided long-term benefits in terms of both successful citizenship and cost effectiveness. States needed to develop immigrant education policies that provided equitable opportunities for all children. Much research had been done on

the societal and fiscal effects of illegal immigration as a whole, but little addressed the education aspect and its costs or consequences.

The purpose of this study was to analyze the history of immigration policy and subsequent court cases that had influenced the treatment of undocumented immigrant children. In addition, to analyze the existing legal basis for educating undocumented immigrant children through the examination of federal and state legislation, attorney general opinions, state statutes, and district school board policies. The desired outcome was to suggest recommendations for policy inclusions for educating illegal immigrant K-12 students.

Policy components for effective immigrant education needed to include:

1) Immigrant student inclusion in all school and district assessments; 2) staff development training in the understanding of the special needs of immigrant children; 3) development of additional instructional materials for immigrant children; 4) assessment instruments in languages other than English and Spanish; 5) increased school counseling services for immigrant children; 6) increased immigrant parent involvement in overall school programs; 7) Inclusion of limited English proficient children in school-wide programs; and 8) a determination of what investments the public was willing to make to ensure the education and future economic success of immigrant children.

CHAPTER 1
INTRODUCTION

This examination of the history of immigration and education legislation in the United States reveals the change process that law and policy underwent through the years. It takes into account both, immigration to the United States and the immigrants themselves. Immigration policies were made at the federal level and addressed broad issues such as quotas and enforcement of immigrant parameters. Immigrant policies, on the other hand, were made at the state level and focused on immigrants already residing in the United States. Immigrant policy makers dealt with how to integrate immigrants into the American population and assist them with public benefits during the transition.[1]

As a nation whose ancestors were all immigrants, much of historical U.S. foreign policy invited foreigners into the country. When immigrant limits and control of U.S. borders became an issue, so did educating the legal and illegal immigrant student population. Laws were passed to control immigration and those who broke the laws in order to enter the U.S. became illegal immigrants. Through no fault of their own, their children were in a country where they were not official residents and needed to be educated.

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[1] Rocio Del Sagrario Toriz <www.aad.berkeley.journal/RocioToriz.html>, "Federal and State Responsibility for Undocumented Immigration," *Berkeley McNair Journal* Three, no. Summer 1995 (1995) <www.aad.berkeley.edu/95journal>.

Each time an immigration law or policy was implemented, the education system was affected. It was believed that had the federal government enforced immigration policy, the states would have not suffered the financial burden incurred from educating the children of immigrants, both legal and illegal.

National estimates of growth in the immigrant student population projected a increase of more than 20 percent, from 34 million in 1990 to 42 million in 2010. It was estimated that more than half of that growth would be attributed to children of immigrants. Proportional changes in Florida's school-age population mirrored or exceeded those occurring in the state's general population. Although in 1990, Hispanics were 12 percent of the total school-age population, by 1996 they had grown to 16 percent. [2] School-age children came from all over the world with a high concentration coming from Hispanic countries.

Purpose Of The Study

The purpose of this study was to analyze the history of immigration policy and subsequent court cases that have influenced the treatment of undocumented immigrant children. In addition, to analyze the existing legal basis for educating undocumented immigrant children through the examination of federal and state legislation, attorney general opinions, state statutes, and district school board policies. The desired outcome was to suggest recommendations for policy enhancements for educating illegal immigrant K-12 students in the state of Florida.

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[2] Martha J. Miller (1997). *Student Enrollment Figures by Ethnicity and Race.* Tallahassee, Fl: Strategy Planning Department, Florida Department of Education.

Significance of the Research

Florida school districts were required to follow federal regulations and Supreme Court guidelines in school admission requirements. Due to the sheer numbers of undocumented immigrant students who resided in and continually entered the state, there was a need for a precedent policy. This research proposed to analyze the historical position of litigation concerning illegal immigration and the education of immigrant children. This study was significant as an attempt to recommend policy inclusions for the state of Florida on the education of the children of undocumented immigrants.

Statement Of The Problem

Since the 1982 Supreme Court decision in Plyler,[3] which required free elementary and secondary education for all children residing within a given state, the numbers of immigrants both legal and illegal arriving in the state of Florida increased. An assessment of the cost of providing special educational programming, along with meeting equity provisions and equality concerns was essential.

With the increase of undocumented immigrant students in mind, the question of the necessity for an illegal immigrant education policy for the state of Florida and the ethical reasoning behind the education of the undocumented student was of interest. A review of some American beliefs on education during the early twentieth century was included.

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[3] *Plyler v. Doe*, 457 US 202 (1982).

History

Opposition to the entry of foreign paupers and aliens "likely at any time to become a public charge" dates from Colonial times.[4] The colony of Massachusetts enacted legislation in 1645 prohibiting the entry of paupers and in 1700 excluding the infirm unless security was given against their becoming public charges. From these beginnings, the United States continued to enact legislation designed to regulate the number of immigrants based on the countries of origin. In so doing, and by not enforcing the legislation, controlling the borders, or monitoring the illegal immigrant population, the United States created an enormous influx of "strangers-in-need". There was a call for legislative policy to regulate not only numbers of immigrants, but also to see if and how the immigrants who were here would be eligible for public services. Educating the children of all immigrants, legal and illegal, became costly for some states due to federal legislation. Federal policy was needed to assist and support these states in following its mandates. States, such as Florida, with the highest immigrant populations, needed an effective policy regarding the education and inclusion of immigrant children.

Historical Immigration Legislation

The United States did not have an immigration policy *per se* for most of the nineteenth century. A bar against the landing of "any person unable to take care of himself or herself without becoming a public charge" was included in the first general federal immigration law, the Chinese Exclusion Act of August 3, 1882,[5] which

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[4] U.S. House of Representatives Ways and Means Committee Print: 104-12 [Green Book] "Appendix J. Noncitizens" *The Personal Responsibility and Work Opportunity Reconciliation Act and Associated Legislation,* 1996, <http://www.access.gpo.gov/cgi> (25 February 1997).

[5] Chinese Exclusion Act, ch.126, 22 Stat.58, 1882 (formerly codified in scattered parts of 8 U.S.C. ch.7).

The Quota Act of May 19, 1921[11] created a National Origins plan under which each country had an immigration quota in proportion to that nation's past contribution to the population of the United States. The Act based the quotas on the 1910 Census of Population and allowed 357,000 immigrants into the United States each year.[12]

The 1924 Immigration Act used the 1890 census of different ethnic groups in the United States as a basis for establishing a national origins quota for emigrant-sending nations.[13] A basic idea reflected in the 1924 Act was the fear that heavy immigration from southern and eastern Europe discriminated against current residents of the United States (largely descended from northern and western Europeans) by diluting the ability of current residents to determine the nation's destiny. The 1924 Act maintained the 1921 exemption for the independent countries of the Western Hemisphere from any quotas.[14] The 1890 census served as an interim provision until Congress established the final national origins system in 1929.[15] Thereafter, Congress set the national origins quota at one-sixth of one percent of the 1920 population to arrive at a base immigration figure of 153,714.[16] The 1920's legislation effectively stopped large-scale immigration to the United States for forty years.

Confidence in American institutions, the realities of World War II alliances, and post-war foreign affairs combined to challenge the basis of America's immigration

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[11] Quota Act, ch.8, 42 Stat. 5 (1921) (formerly codified at 8 U.S.C. §§ 229-31).

[12] Ibid.

[13] The Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) (formerly codified at 8 U.S.C. §§ 201-204).

[14] Bennett, *American Immigration Policies*, p 47.

[15] Act of July 1, 1929, ch. 306, 45 Stat. 400 (formerly codified at 8 U.S.C. § 204c).

[16] Ibid.

policy.[17] Congress liberalized Asian immigration during and shortly after World War II.[18] On June 27, 1952, the McCarran-Walter Act[19] effectively altered the immigration policy of the United States by removing racial bias from the setting of national origin quotas, since particular immigrants could not be excluded on account of race. The 1952 Act retained the 1920 quota base.[20] Senator McCarran maintained that the nation had always been besieged by immigrants and that ending the national origins system would cause further conflict in an ethnically altered United States.[21] McCarran wanted to end racial discrimination in immigration admissions, but he felt that the United States could best serve its mission in the world by remaining true to its culture and by assimilating non-Europeans very slowly.[22] The justifications of cultural unity, which had so concerned Congress, never dominated immigration debates after 1952.

The confidence and determination to confront America's history of racism continued with renewed fervor during the decade of the 1960s. Congress passed such

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[17] Gregg Van De Mark , *Too Much of a Good Thing*, Washburn Law Journal 35, no. 3 (Spring 1996) <http://washburnlaw.wuacc.edu/school/publictns/wlj>.

[18] Congress repealed the Chinese Exclusion Act *by* the Act of December 17, 1943 (ch. 344, 57 Stat 600 (formerly codified at 8 U.S.C. §§ 262-97, 299)).

[19] McCarran-Walter Act, ch. 477, 66 Stat. 1633, 8 U.S.C. § 1101, 1952.

[20] Ibid.

[21] CONGRESSIONAL RECORD, pt 4, p. 5330 (1952).

[22] Ibid.

legislation as the 1964 Civil Rights Act[23] and the 1965 Voting Rights Act[24] in response to the new activist mood.[25]

The 1965 Immigration Act[26] abolished the old national origins formula. Each country outside of the Western Hemisphere received unlimited visas for relatives of citizens and 20,000 visas for ordinary immigrants.[27] The Act set quotas on immigration from the nations of the Western Hemisphere for the first time. The 1965 Act also offered a first-in-time, first-in-right system for 120,000 immigrants not related to United States citizens.[28]

Immigration resulting from the 1965 Immigration Act altered the demographic makeup of the United States over a mere thirty-year period. In 1960, one out of ten Americans was non-white.[29] According to the 1990 census, one out of four Americans claimed to be non-white.[30] The United States no longer consisted of an overwhelming white majority, with significant minorities of blacks, Hispanics and to a lessor and more localized degree, American Indians and Asians.

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[23] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

[24] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[25] Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65).

[26] Immigration Act of 1965, Pub. L. No. 89-235, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1-14354 (1994).

[27] Bill Ong Hing, *Making and Remaking Asia America through Immigration Policy 1850-1990*, pp. 38-41 (1993); quoted in Van De Mark, *Too Much of a Good Thing*.

[28] Ibid.

[29] Bureau of the Census, U.S. Department of Commerce, Census Population of 1960, Characteristics of the Population, pt. 1, at 145, tbl. 44 (1964).

[30] Bureau of the Census, U.S. Department of Commerce, 1990 Census of Population, General Population Characteristics, 323 tbl. 253 (1992).

Immigration Policy

Congress made several substantive changes to immigration policy after 1965. The patterns of immigration and the policy considerations relating to it in the 1970s resembled, in some respects, those of the decade of the1950s after the enactment of the Immigration and Nationality Act.[31] In both decades, the entry of aliens outside the provisions of the basic law--both illegally as undocumented aliens, and legally as refugees--was increasingly the dominant pattern in immigration and the basis for the major issues confronting Congress.

Legislative response to the issue of refugees in 1980 with the Refugee Act of 1980,[32] and undocumented aliens in 1986, the Immigration Reform and Control Act, [33] was followed in 1987 by a shift in congressional attention to legal immigration.[34] The Immigration Reform and Control Act of 1986 (IRCA) granted amnesty to certain illegal immigrants and mandated employer sanctions for those hiring illegal immigrants as a way to deter future arrivals.[35]

The Immigration Act of 1990[36] increased the number of available immigrant visas to 700,000 from the prior limit of 490,000 for fiscal years 1992-93 and 1993-94, and to 675,000 thereafter. Therefore, proposals to cut immigration by one-third did nothing

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[31] McCarran-Walter Act, ch. 477, 66 Stat. 163, 8 U.S.C. § 1101 et seq. as amended throughout 8 U.S.C.

[32] Refugee Act of March 17, 1980, *Immigration and Nationality Act*, [101(a)(42)(A)].

[33] Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3359 (1986).

[34] "The 1970s Through 1990s: Immigration Issues, Review, and Revision" <www.fairus.org> March 1996.

[35] Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3359 (1986).

[36] The Immigration Act of 1990, Pub. L. No. 101-649 §§ 111-24, 104 Stat. 4978-97 (1990).

more than re-establish the immigration levels of the decade of the 1980s, the highest ever in the country's history up to that time.

Immigration Statistics

In 1994, the Immigration and Naturalization Service (INS) released detailed estimates of the undocumented immigrant population in the United States as of October 1992. Those estimates were useful for a variety of purposes, including planning and policy development at the national and state level, evaluating the effects of proposed legislation, and assessing the fiscal impact of undocumented immigration. Between 1994 and October 1996, the INS revised and updated those estimates. As of October 1996, an estimated 5 million undocumented immigrants were residing in the United States. An estimated 350,000 undocumented aliens lived in Florida. The undocumented immigrant population was estimated to be growing by about 275,000 each year, which was about 25,000 lower than the annual level of growth estimated by the INS in 1994.[37]

California was the leading state of residence with 2 million, or 40 percent of the undocumented population. The seven states with the largest estimated numbers of undocumented immigrants in 1994 including California were Texas (700,000), New York (540,000), Florida (350,000), Illinois (290,000), New Jersey (135,000), and Arizona (115,000). These seven states accounted for 83 percent of the total undocumented population in October 1996.[38]

From 1960 to 1997, the foreign-born population increased from 1.3 million to 8.1 million in California, and from 0.3 million to 2.4 million in Florida, and

[37] "Illegal Alien Resident Population" <www.ins.usdoj.gov/textonly/stats/index.html> 23 November 1997.

[38] Ibid.

from o.3 million to 2.2 million in Texas.[39] The foreign-born population in these three states combined rose from 1.9 million to 12.6 million, and the increase of 10.7 million represented 67 percent of the growth of the foreign-born population in the United States. During the period from 1960 to 1997, these three states accounted for 41 percent of the growth in total population.[40]

Illegal Immigration

The U.S. Supreme Court in 1982, by a 5 to 4 ruling, invalidated a 1975 Texas State Statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States, and which authorized local school districts to deny enrollment to such children.[41] The ruling in *Plyler v. Doe* [42] held that illegal immigrant children were entitled to an education since they were not responsible for their immigration status and were covered by the Equal Protection Clause of the Fourteenth Amendment to the constitution, which prohibited states from denying any person equal protection under the laws.[43]

The court recognized the importance of education to individuals and our nation and concluded that the denial of education to this class of students could be justified only if it advanced a substantial state goal. The state offered several justifications for its law,

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[39] U.S. Census Bureau, *Profile of the Foreign-Born Population of the United States*: 1997.

[40] Ibid.

[41] Texas Education Code Ann 21.031 (Vernon Supp.1981).

[42] *Plyler v. Doe*, 457 U.S. 202 (1982).

[43] Joseph Perkins, *The San Diego Union-Tribune*, June 11, 1997, B-9, pg 2. Constitutional scholars said that neither Congress nor the state legislatures intended for the 14th Amendment to apply to the children of undocumented immigrants. That was because, when the amendment was originally proposed 130-some years ago, the United States had a defacto "open border" policy. There could be no illegal immigration.

such as preserving the government's financial resources, protecting the state from an influx of illegal immigrants, and maintaining a high quality of education for resident children. The Supreme Court, however, was not convinced that the law in question advanced these objectives. The Court reasoned that any funds saved by denying education to illegal alien children would be insignificant compared to the costs to the children, the state, and our nation. The Court noted that many of these children would remain in the United States and, if uneducated, would ultimately place a burden on our society. Finding no "rational justification for penalizing these children for their presence within the United States, over which they had no control," the Court struck down the law.[44] As a result of this decision, public school districts were obligated to educate immigrant children residing with their parents or guardians within a district's boundaries, even if the families had entered the country illegally.

Public schools, however, did not have to admit non-resident immigrants tuition-free. In 1983, the Supreme Court upheld a state law allowing local school boards to deny tuition-free schooling to any minor who lived apart from a parent or legal guardian for the primary purpose of attending public school.[45] Thus, unlike immigrant children who came to the U.S. with their parents (even illegally), immigrant children who left their families to live in the United States for educational purposes were not entitled to free schooling.

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[44] Ibid.

[45] *Martinez v. Bynum*, 461 U.S. 321 (1983).

Table 1-1 Estimated Illegal Immigrant Population for Top Twenty Countries of Origin and Top Twenty States of Residence: October 1996

Country of Origin	Population	State Of Residence	Population
All countries	5,000,000	All states	5,000,000
1. Mexico	2,700,000	1. California	2,000,000
2. El Salvador	335,000	2. Texas	700,000
3. Guatemala	165,000	3. New York	540,000
4. Canada	120,000	4. Florida	350,000
5. Haiti	105,000	5. Illinois	290,000
6. Philippines	95,000	6. New Jersey	135,000
7. Honduras	90,000	7. Arizona	115,000
8. Poland	70,000	8. Massachusetts	85,000
9. Nicaragua	70,000	9. Virginia	55,000
10. Bahamas	70,000	10. Washington	52,000
11. Colombia	65,000	11. Colorado	45,000
12. Ecuador	55,000	12. Maryland	44,000
13. Dom. Republic	50,000	13. Michigan	37,000
14. Trinidad/Tobago	50,000	14. Pennsylvania	37,000
15. Jamaica	50,000	15. New Mexico	37,000
16. Pakistan	41,000	16. Oregon	33,000
17. India	33,000	17. Georgia	32,000
18. Dominica	32,000	18. District of Columbia	30,000
19. Peru	30,000	19. Connecticut	29,000
20. Korea	30,000	20. Nevada	24,000
Other	744,000	Other	330,000

Source: Illegal Resident Population, Immigration and Naturalization Service, 1997.

Estimating the size of a hidden population was inherently difficult. The figures presented here reflect the size, origin, and geographic distribution of the undocumented immigrant population residing in the United States during the mid-1990s. These estimates were constructed by combining detailed statistics, by year of entry, for each component of change that contributed to the undocumented immigrant population residing within the state.[46]

[46] "Illegal Alien Resident Population" <www.ins.usdoj.gov/textonly/stats/index.html> 23 November 1997.

Immigrant Education

An additional Supreme Court decision with implications for immigrant children was *Lau v. Nicols*, rendered in 1974.[47] This case focused on the rights of non-English speaking children and the corresponding duties of public schools to address these students' unique needs. Specifically, Chinese students asserted that the San Francisco public school program violated the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964[48] by failing to make adequate provisions for the needs of students with English language deficiencies. The Court held that the lack of sufficient remedial English instruction violated Title VI, which prohibited discrimination on the basis of race, color, or national origin in institutions with federally assisted programs.[49] The court held that equal opportunities were not provided by giving students the same textbooks, teachers, and curriculum. Further, requiring children to acquire English skills on their own before they could hope to make any progress in school made "a mockery of public education."[50] Emphasizing that "basic English skill is at the very core of what these public schools teach,"[51] the Court concluded "students who do not understand English are effectively foreclosed from any meaningful education."[52]

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[47] *Lau v. Nichols*, 414 U.S. 563 (1974).

[48] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

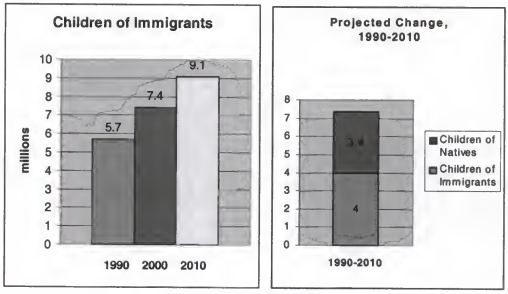
[49] 42 U.S.C. § 2000(d).

[50] 414 U.S. at 566.

[51] Ibid.

[52] Ibid.

The federal Equal Educational Opportunities Act (EEOA) of 1974[53] required each public school system to develop appropriate programs "to overcome language barriers that impeded equal participation by its students in its instructional program." While the EEOA stipulated that school districts must provide appropriate assistance for students with English deficiencies, it did not require that such assistance be in the form of bilingual or bicultural education. School districts could satisfy legal requirements by providing remedial English instruction rather than bilingual programs. Each state was responsible for providing a school system whereby all children received an education with no charge for attending school. The federal Equal Education Opportunities Act of 1974 also provided that no state could deny equal education opportunities to an individual because of his or her race, color, sex or national origin. Every person had the right to attend school, unless his or her conduct violated valid rules and regulations.[54]



Source: Fix and Passel (1994).

Figure 1-1 School-Age Immigrant Population, 1990-2010

[53] Equal Education Opportunities Act of 1974 (EEOA) at 20 U.S.C. 1703.

In considering the educational needs of students learning English, a look at the past proved to be judicious. At the turn of this century, a peak time for United States immigration, educational achievement was not the key factor in determining economic success. A strong back and willing hands were as important as the ability to read and write. During that period, it often took three generations for families to move into the American mainstream. Less than 100 years later, manual labor had little economic value. As the value of physical labor diminished, the expectations for effective communication and literacy increased. Students were not only required to have at least a high school diploma, they were required to be fully literate in English, to understand academic subjects and to know how to use technology. Instead of waiting generations for their families to acculturate to the mainstream, students were expected to assimilate into the mainstream within a matter of a few years.[55]

The relationship of immigration and education became a heated policy issue in 1994 due to a California proposal to deny taxpayer-financed education to illegal alien children. California's Proposition 187,[56] which restricted government funded programs from serving illegal immigrants, passed in 1994 by a significant majority. A federal judge froze implementation of the provision in November 1997. Judge Mariana Pfailzer declared that it violated both the Constitution and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The judge cited as unlawful the initiative's major sections--those barring undocumented immigrants from receiving publicly funded

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[54] Ibid.

[55] Sandra H. Fradd and Okhee Lee, eds., 1998. *Creating Florida's Multilingual Workforce*, Miami, Custom Copy and Printing.

[56] 57 Cal. App.4th 693.

education, social services and health care--along with complementary provisions mandating that local law enforcement authorities, school administrators, social workers, and health-care aides turn in "suspected" undocumented immigrants.[57] Other opponents of the measure argued that it was unconstitutional, citing the 1982 *Plyler v. Doe* Supreme Court decision.[58] That decision centered on the view that the state had enacted an immigration-related law, whereas the federal government, which had not acted on the issue, had exclusive jurisdiction.[59]

Societal Impact

One of the most controversial political and economic issues in the United States at the time was the influence immigrants entering the country had on society. Some people categorized immigrants as an uneducated, unskilled burden on our economy that took advantage of many of the government funded programs established for the benefit of U.S. citizens. Opponents of the U.S. policy on immigration believed that "drastic steps" needed to be taken to curb the number of immigrants entering the United States.[60] Politicians expressed their willingness to support measures that would close the borders and deny children of undocumented workers an education. After California voters passed Proposition 187,[61] other states attempted to restrict undocumented alien access to government-funded programs.[62]

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[57] "Federal Judge: Proposition 187 Unconstitutional. Stage Set for Appeal of Anti-immigrant Initiative," *Los Angeles Times*, 5A, November 15, 1997.

[58] *Plyler v. Doe*, 457 U.S. 202 (1982).

[59] Chinese Exclusion Act, ch.126, 22 Stat.58, 1882 (formerly codified in scattered parts of 8 U.S.C. ch.7).

[60] 57 Cal. App.4th 693.

[61] Ibid.

Historically, federal and state governments worked to keep students 'in' school, rather than 'out.' But as part of the wave of anti-immigrant sentiment, several proposals were made to bar undocumented immigrant students from attending public schools. California's victorious 1994 ballot measure, Proposition 187, barred undocumented students from the public schools.[63]

The Gallegly Amendment (1996)[64] passed in the U.S. House of Representatives as part of an immigration-reform bill and gave states the authority to limit access. A portion of the Gallegly amendment read:

> "Congress declares it to be the policy of the United States that … aliens who are not lawfully present in the United States not be entitled to public education benefits in the same manner as United States citizens and lawful resident aliens…"[65]

Supporters of the Gallegly Amendment argued that America's education system, like other social-service programs, attracted a disproportionate number of immigrants and that the cost of educating such children was too high in an era of tight school budgets.[66] Opponents of the measure denounced it as cruel; hundreds of thousands of children could potentially be turned away at the schoolhouse door.[67]

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[62] Abel Carmona, *Dispelling Myths About Immigrant Students*, IRDA Newsletter, May 1996 <www.irda.org/Newsltr/1996/May>.

[63] Ibid.

[64] H. R. (2022).

[65] Charles Levendosky, "The Politics of Turning Children into Victims," *Casper (Wyo.) Star Tribune*, May 1996 <www.latinolink.com> October 1998.

[66] "Illegal Immigrant Children: In or Out of Public Schools?" *Education Week*, April 1996, <www.edweek.org/context/election/immig.htm>.

[67] Carmona, *Dispelling Myths About Immigrant Students*.

The immigrant population was similar to the United States population in that it included people with varying degrees of education. Some had less than eight years of formal education and others had doctorates. The educational level of immigrants was higher than those of the past and continued to improve. On average, the proportion of immigrants with post-graduate degrees was greater than the proportion of people with post-graduate degrees in the native population. [68]

Just as the privileges of our society afforded to its educated people served as incentives for people to become educated, it also served as an incentive for some to emigrate here, even those who were from countries as prosperous. As a consequence of this phenomenon, the United States experienced a growth in our pool of people who excelled in such technological fields as engineering, mathematics and science.[69] With this growth, the United States had the potential of increasing its productivity and expanding into frontiers in many fields of study, particularly in technology and science.[70]

A study of immigrant middle school students,[71] made available by Johns Hopkins University, reported that the children of immigrants overwhelmingly preferred English to their parents' native languages. The initial study was done in 1990 and 1991.[72]

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[68] Julian Simon, *Immigration: The Demographics and Economic Facts*. Washington, DC: Cato Institute and National Immigration Forum, 1995.

[69] David W. Stewart, *Immigration and Education: The Crisis and the Opportunities*. New York, Lexington Books, 1993.

[70] Carmona, <www.irda.org/Newsltr/1996/May>.

[71] James M. McPartland, Project Director. Center for Research on the Education of Disadvantaged Students (CDS), *Project # 7126: The Adaptation of Immigrant Children in the American Educational System.* John Hopkins University (1997).

[72] Ruben G Rumbaut, (August 1990). *Immigrant Students in California Public Schools: A Summary of Current Knowledge.* CDS Report No. 11, and Alejandro Protes (1991), *Characteristics and Performance of High School Students in Dade County* (Miami) *Schools.* CDS Report No. 24.

The results of this study indicated that the children of immigrants were unlikely to develop into an underclass, as some experts feared, cut off by academic failure and an inability to speak English. But the researchers also found it was uncertain how well the children of immigrants, who made up 20 percent of all children in the U.S., would do in college and in the job market.[73]

The research team, led by sociologists Ruben Rumbaut of Michigan State University and Alejandro Protes of Princeton University, first interviewed 5,200 eighth and ninth graders in San Diego and South Florida in 1992. They located 82 percent of the initial sample for a second interview in 1995 and 1996.[74]

The research found that the children of Chinese, Indian, Japanese and Korean parents got the best grades, an average of A's and B's. English speaking West Indians had lower grades, Cs and C+, while Latin American and Haitian youths performed most poorly, with averages that were slightly higher or lower than a C.[75]

But a few groups defied what would have been expected based on their socioeconomic status. The children of Southeast Asian refugees, who came from the most impoverished background and whose parents were among the least educated, were also among the least likely to drop out and had above average grades. And the children of Cuban immigrants, who were from average to above-average socioeconomic backgrounds, had the highest dropout rates and among the lowest grades, the survey reported. The Cuban children, who belonged to the dominant group in Metropolitan

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[73] Ibid.

[74] Ibid.

[75] Ibid.

Miami, faced less discrimination than any other group in the survey. The children of Cubans did worse academically than the children of Mexicans, who were one of the poorest and were by far the largest immigrant group in the United States. On the issue of language, the survey found while nine out of ten of the youths surveyed spoke a language other than English at home, almost exactly the same proportion, 88 percent, preferred English by the end of high school.[76]

Fiscal Responsibilities

Schools were caught in a struggle between the needs of immigrant children who filled their classrooms and the growing number of parents and taxpayers unwilling to expend more money for bilingual instructors to teach these students and buildings to house them. According to The Center for Immigration Studies, it costs 50 percent more to educate a child with limited English proficiency than a child with fluency in English.[77]

To help cover the cost of educating these children, the federal government gave about $30 million a year through the Emergency Immigration Education Act of 1984.[78] But educators and politicians believed the act was under-funded. In 1994, California, Texas, New Jersey, New York, and Florida sued the federal government for billions of dollars to cover the costs of educating undocumented immigrant children. The court eventually rejected the state cases.[79]

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[76] Ibid.

[77] Vail, "No Entry" pp. 19-25.

[78] The Emergency Immigrant Education Act (EIEA), (Title IV, Part D of the Elementary and Secondary Education Act), as amended, (20 U.S.C. 3121-3130) (expired September 30, 1999).

[79] Vail, "No Entry" pp. 19-25.

The State of Florida was unable to prove to the federal government that illegal immigration in Florida had a significant impact. Florida was forced to rely on speculation on some of its figures, which weakened its case. The burden of proof of additional costs due to illegal immigrants remained with the state.[80]

Florida's education costs for both legal and illegal immigrants in 1993 were $517.6 million, which was up 24 percent from 1992's expenditure of $418.5 million. The state spent $254 million alone on the English for Speakers of Other Languages (ESOL) program.[81]

Education for illegal aliens totaled $180.4 million in 1993. This number represented another 24 percent increase in costs from the previous year when illegal alien education was $145.9 million. The increase was due to the rise in numbers of illegal aliens arriving in Florida.[82]

According to Kathleen Vail, an assistant editor of *The American School Board Journal*, much of the increase in public school enrollment was due to rising immigration. This mounting enrollment strained schools that were already dealing with the recent influx of immigrant children. The immigrant children taxed the schools further by needing bilingual teachers and language programs. The schools were forced to spend scarce resources on immigrant students. Immigrant families tended to have larger

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[80] John Digrado, "News", *Daily Bruin*, May 1996, <http://www.dailybruin.ucla.edu> (October 1998).

[81] "Florida: Social Policy Issues," *Immigration and Florida: Social Policy Issues*, 1997, <http://www.fairus.org> (1 February 1998).

[82] Ibid.

families than Americans, which meant more children per family in need of bilingual education and special services.[83]

As of 1993, approximately 60 percent of all foreign-born people residing in the United States came to this country during the decade of the 1980's.[84] About 9 million immigrants came during those years, increasing the U.S. population by 6 percent. The children of these immigrants, about 2 million of them, enrolled in school, increasing enrollment in English as a Second Language classes by 50 percent. Five states had carried the burden of this wave, according to Rand. More than 70 percent of all immigrants lived in California, New York, Texas, Florida, and Illinois.[85]

The Center for Immigration Studies estimated an additional 50 percent cost to educate a student with limited English proficiency than one who was fluent in English. But opponents in the immigration debate disagreed over whether immigrant families produced enough tax revenue to pay for the extra services they received. Immigrant-rights groups said that immigrants, including illegals, paid enough taxes to cover the costs of educating their children. According to the Urban Institute, local, state, and federal governments spent some $42.9 billion a year in services for immigrants, including $11.8 billion for educating legal and illegal immigrant children. This expense was more than offset by the taxes legal and illegal immigrant families paid--$70.3 billion a year, according to the Urban Institute. But in 1992, Rice University professor Donald Huddle put the cost of educating immigrants at $16.4 billion--and the total cost for services for

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[83] Vail, "No Entry" pp. 19-25.

[84] Lorraine M. McDonnell and Paul T. Hill, *Newcomers in American Schools: Meeting the Educational Needs of Immigrant Youth*, Santa Monica, Calif.: RAND, MR-103-AWM/PRIP, 1993.

[85] Ibid., p. 22.

immigrants at $62.7 billion. In the study, funded by the Carrying Capacity Network, Huddle said immigrants paid only $20 billion in taxes.[86]

There was no comprehensive rule that restricted direct federal assistance or federally funded assistance on the basis of immigration status. This was true both with respect to legal permanent residents who entered under the admission system of the Immigration and Nationality Act of 1986[87] and to aliens who entered or remained in violation of the law.[88]

Those restrictions that did exist had been enacted on a program-by-program basis, beginning in the 1970s. Most existing restrictions denied assistance to aliens who were here without legal permission.[89]

Immigration policies were made at the federal level and addressed broad issues such as quotas and enforcement of immigrant requirements. Immigrant policies, on the other hand, were made at the state level and focused on immigrants already residing in the United States. Immigrant policy makers dealt with how to integrate immigrants into the American population and assist them with public benefits during the transition.[90]

There were three basic policy issues concerning education and immigration: education of illegal alien children, the volume of legal immigration and the strain it put

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[86] Donald Huddle 1994, *"The Net National Costs of Immigration in 1993"* June 1994. This was a comprehensive nationwide study of the fiscal impact of immigration.

[87] Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 3359 (1986).

[88] McDonnell, and Hill, RAND, MR-103-AWM/PRIP, 1993.

[89] Ibid.

[90] Rocio Del Sagrario Toriz <www.aad.berkeley.journal/RocioToriz.html>, "Federal and State Responsibility for Undocumented Immigration," *Berkeley McNair Journal* Three, no. Summer 1995 (1995) <www.aad.berkeley.edu/95journal>.

on the schools and public budgets, and the admission of foreign students to U.S. universities as a route to immigration status.[91]

Research Question

In order to investigate this problem, the following questions were addressed. Does the state of Florida have a legal, ethical, and moral obligation to educate the children of undocumented immigrants? Does the state require a policy directed specifically to the education of these children? What should Florida's policy be on educating the children of undocumented immigrants?

Methodology

The traditional method of Policy Analysis/Legal Investigation was utilized to identify judicial reasoning relative to established legal principles and applications in relevant cases involving undocumented immigrant education. The procedure included identifying relevant constitutional amendments, federal acts, state statutes, and rules and regulations. Relevant cases were compiled, and judicial reasoning in each case was analyzed.

To address the purposes of the study, there was a need to develop suggested sample policy inclusions for implementation by all school districts within the state of Florida. Several methods of legal research were employed. Specifically, policy study and traditional legal research were appropriate. To accomplish this task, it was necessary and prudent to research the status of current policies as well as research the appropriate laws and rulings.

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[91] "Immigrants and Education," in Fair <www.fairus.org>, May 1997.

Legal research, as generally defined, was a systematic investigation, which involves interpreting and explaining the law.[92] Historically, legal research has relied on precedent.

The methodology utilized in this study was not only to review the previous and current policies, but also to build a foundation for designing a model for undocumented immigrant education policy for the state of Florida.

Definition Of Terms

1) Undocumented immigrant: designates persons who are correspondingly referred to as "illegal immigrants" or "illegal aliens." Congressional Research Service defines illegal aliens as persons who have violated immigration law.

2) Fundamental Rights: those rights explicitly or implicitly provided by the federal constitution such as the right to exercise First Amendment freedoms. The courts have found that education is a not fundamental right.

3) Procedural due process: guarantees procedural fairness where a person's property or liberty is deprived by the government.

4) Suspect Classification: "deserving of special scrutiny" include those based on race, national origin, religion, alienage, non-residency".

5) Undocumented aliens: persons who are in the United States in violation of the Immigration and Naturalization Act. They either entered this country illegally or entered legally, then violated conditions of entry.

6) Undocumented alien children: children who live with their parents who are residing in the United States illegally; children whose parents reside in another country, and the children are residing in the United States with someone who is not their "parent, guardian, or person having lawful control" for the sole purpose of attending free public school.

7) Newcomer: a recent immigrant, either legal or illegal.

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[92] Charles J. Russo, *Legal Research: The 'Traditional Method,* 28 NOLPE Notes 2 (October 1993).

Limitations

This study provides an analysis of previous statutes, court cases, school board policies, and attorney general opinions related to the education of undocumented alien children. As the members of the courts change, changes could develop in the legal bases providing the foundation for this study.

Further limitations are listed below.

1) It is unlawful to ask for proof of legal status from a student.
2) Discussion of education expenditures include K-12 but not post-secondary.
3) Data available are estimates from the total population.
4) Most recent Census data is for 1990 (with estimates for 2000).
5) The transient nature of the target population.
6) Local governments do not document U.S. residency status of local service consumers, in part, because local residency is a requirement for local service eligibility: U.S. residency status is not a program eligibility requirement.
7) Statutory and other data collection requirements on Newcomers for state and local entities are incomplete, unverified, sometimes non-mandatory, of relatively low priority, include no provisions for centralized reporting, and are under-utilized by state and local governments.

Design Of Study

The framework for this study was provided by legal doctrines that can be identified in the U.S. Constitution, federal and state case law, statutes, and rules and regulations, and the Florida Constitution. The study was an examination of law and policy as it related to the education of undocumented immigrant children. It looked at estimates and percentages of undocumented alien children and the educational programs

they require. Data were retrieved from the Internet and/or public documents and publications.

1) The study examined historical constitutional issues involved in educating undocumented alien children in order to demonstrate previous policy.

2) The study analyzed the United States Supreme Court ruling in *Plyler v. Doe* (1982) in order to understand the current paradigm.

3) The study examined California's Proposition 187, and its implications for legislative policy for the state of Florida.

4) The study looked at some of the ethical and moral considerations of educating undocumented alien children in order to determine the obligations of the state of Florida.

5) The study suggested a feasible policy on undocumented immigrant education for the state of Florida.

Organization of the Chapters

Chapter 1 provides introductory information, a statement of the problem, and the significance, methodology, limitations, and design of the study. The remainder of this study is organized in the following manner. Chapter 2 presents an historical review of immigration legislation through 1982. Chapter 3 continues with the historical review and looks at some illegal immigration statistics for the United States and the state of Florida. Chapter 4 presents some financial and ethical issues related to the education of undocumented immigrant children. Using some historical information, it also puts forward the question of what would the political atmosphere regarding the education of immigrant children would be like if the *Plyler* decision had been different. Chapter 5 suggests inclusions for a practical immigrant education policy for the state of Florida, including the undocumented immigrant student.

CHAPTER 2
HISTORICAL REVIEW OF IMMIGRATION LEGISLATION

Introduction

This chapter discusses immigrants and immigration and examines U.S. immigrant legislation through 1982. It looks at the origins of immigration and immigrant education policies and the reasons they came into existence.

Immigration Legislation

The extraordinary migrations of peoples from Europe and Asia to the Americas, Australia, and Africa during the last hundred years, not as colonists but as immigrants to countries already politically established, was one of the noticeable and far-reaching phenomena of the economic age. The United States, as the country that received these immigrants in greatest numbers, experienced the greatest perplexity over the problems this immigration created.

The United States continued to be an appealing place to live. If it were less desirable, perhaps residence in the U.S. would not need to be legally restricted. But, in the closing years of this century, immigration levels were at an historic high, and the demand remained as great as it had ever been. The assumption behind U.S. citizenship and immigration law was that we could not embrace all who wanted to make this country their home. There needed to be some standard for admission and exclusion. So whom

could we admit? This was essentially the question immigration law and policy had to address. States could not make their own policies on immigration admissions. Immigration policy was the overarching responsibility of the national government, chiefly, the legislative branch.[1]

American immigration policy was alleged to rival the federal tax code in its complexity. Federal immigration laws, beginning with the act of 1875, served three general purposes: to deny admission, to facilitate entrance for qualitative reasons and to limit the number of entrants.[2]

The power of a nation to deny admission of a foreigner to its territory was a right under international law that had been exercised in all times. Complete exclusion of foreigners and the denial of free communication with foreign nations, however, had been treated as an act of unfriendly or hostile character, and against it nations have applied forceful methods. In this manner, the foreign exclusion policy imposed upon China by the Manchu Dynasty was broken by European nations, even at the cost of war; and in 1854 the United States, by a naval demonstration by Commodore Perry, coerced the government of Japan into abandoning its policy of non-communication with foreign nations, which had been in place for nearly 250 years.[3]

Immigration into the United States had passed through several phases. Prior to 1880, immigration consisted almost exclusively of peoples of northern Europe, who were

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[1] James G. Gimpel and James R. Edwards, Jr., *The Congressional Politics of Immigration Reform*, Boston, Allyn and Bacon, 1999.

[2] Ibid.

[3] The Lincoln Library of Essential Information, 35th ed., s.v. "Immigration." Frontier Press: Columbus, Ohio, (1972).

the original settlers of the United States. After that date, immigration from northern Europe declined, while that from southern Europe and from Russia rapidly increased. This so-called "new immigration" produced a change in the American attitude toward unlimited immigration. Until World War I, the immigration laws were designed only to exclude certain undesirable categories, including the feeble-minded, insane, epileptics, sufferers from certain contagious diseases, paupers, criminals, prostitutes, polygamists, anarchists, and those convicted of, or admitting to, crimes or misdemeanors "involving moral turpitude." The importation of labor under contract was also forbidden.[4]

Asiatic immigration was restricted, first, by the Chinese Exclusion Act of 1882,[5] re-enacted in 1892 and in 1902, whereby all immigration from China, except students, merchants, and a few other classes, was forbidden.[6] Not until December 1943, was the exclusion law repealed, and the Chinese placed on the same footing as other immigrants. After 1900, when Japanese immigration into California became notable, an exclusion league was organized in that state and agitation was initiated to secure legislation forbidding the admission of Japanese. In 1907, when an immigration bill restricting the admission of Japanese and Korean laborers was introduced into Congress, the president secured in its place the Congressional authority to suspend Japanese and Korean labor immigrants coming from our insular possessions or from Canada or Mexico. An agreement was made between the United States and Japan—the so-called "gentlemen's

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[4] Ibid.

[5] *Chinese Exclusion Act*, ch. 126,22 Stat.58. 1882.

[6] The Lincoln Library of Essential Information.

agreement"—whereby the latter government undertook to limit, by the refusal of passports, the entrance of laborers into the United States.[7]

In 1924, the United States Congress passed an act[8] that reduced annual immigration to 2 percent of the number of foreign residents in 1890. A minimum of 100 was accorded to each country. This law was replaced in 1965[9] by a measure phasing out the quota system by July 1, 1968. It provided for a total permissible immigration of 120,000 yearly from independent countries of the Western Hemisphere and 170,000 from all other countries, but not over 20,000 from any one country. Preference was given to members of professions or those having special talents or education. In addition, immediate relatives of citizens could be admitted without limit, including minor children, spouses, and parents. No previous law had limited immigration from the Western Hemisphere.[10]

American Immigration Before 1920

Prior to the 1790 Naturalization Rule, the United States did not have an immigration policy. It did enact laws pertaining to the entry of people into the country, although it was doubtful that these could be considered part of a true immigration policy.[11] The 1790 immigration rule required a two-year residency period combined with

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[7] Ibid.

[8] *The Immigration Act of 1924*, ch. 190, 43 Stat. 153 (1924).

[9] Immigration Act of 1965, Pub. L. No. 89-235, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1-14354 (1994).

[10] Ibid.

[11] Gregg Van De Mark *"Too Much of a Good Thing,"* Washburn Law Journal 35, no. 3 (Spring 1996) <http://washburnlaw.wuacc.edu/school/publictns/wlj>.

a renunciation of foreign citizenship and loyalty. Congress then gave the President the power to deport foreign revolutionaries under a 1798 alien act. In 1802, Congress changed the period required for naturalization to five years.[12]

The fight against illegal immigration began in 1875 when the United States established its first law limiting immigration, which prohibited the entrance of convicts and prostitutes.[13] Then in 1882, Congress established legal limits on immigration excluding Asian immigration.[14] The 1882 law also solidified the establishment of the United States Constitution as the supreme law of the land.[15]

In 1907, Congress set up an immigration commission (Dillingham Commission) to study the growing immigration concerns of the general public. The main concerns of those pushing for immigration controls were the assimilability of the new immigrants, their sheer numbers, and their effect on the nation's politics, language and culture.[16] The commission's investigation—the most exhaustive study of immigration in American history—originated in response to calls to curtail immigration from Japan and southern and eastern Europe. In 1911, the Dillingham Commission eventually recommended restrictive changes to America's immigration laws.[17]

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[12] Lawrence G. Brown, "*Immigration: Cultural Conflicts and Social Adjustments*" 267 (1969).

[13] Vail, "*No Entry*" pp. 22-25.

[14] *Chinese Exclusion Act*, ch.126, 22 Stat. 58, 1882.

[15] U.S. Constitutions, Art. VI, cl.2.

[16] Thomas A. Aleinikoff, and David Martin, *Immigration: Process and Policy*, 1-42 (interim 2d ed. 1991).

[17] Ibid.

Immigration Policy After 1920

Congress finally responded to the Dillingham Commission's recommendations ten years later by passing the Quota Act on May 19, 1921.[18] The Act created a National Origins plan under which each country had an immigrant quota in proportion to that nation's past contribution to the population of the United States.[19] The Act based the quotas on the 1910 census and allowed 357,000 immigrants into the United States each year.[20]

The 1924 Immigration Act used the 1890 census of different ethnic groups in the United States as a basis for establishing a national origins quota for emigrant-sending nations.[21] The primary idea reflected in the Act of 1924 was the fear that heavy immigration from southern and eastern Europe discriminated against current residents of the United States (largely descended from northern and western Europeans) by diluting the ability of current residents to determine the nation's destiny.[22] The 1924 Act maintained the 1921 exemption from quotas for the independent countries of the Western Hemisphere.[23] The Western Hemisphere exception resulted from a combination of the economic interests of southwestern ranchers and farmers and a policy of Pan-Americanism that emphasized solidarity against the problems of Europe. Thus the

[18] Quota Act, ch. 8, 42 Stat. 5 (1921).

[19] Ibid.

[20] Ibid.

[21] *The Immigration Act of 1924*, ch. 190, 43 Stat. 153 (1924).

[22] Benjamin M. Ziegler, ed., *Immigration*, An American Dilemma 13 (1953).

[23] Marion T. Bennett, *American Immigration Policies: A History*, 249-55 (1963).

1920s' legislation sought to preserve the European heritage as it had developed in the United States without identifying our nation with modern Europe.[24]

The 1890 census served as a temporary provision until Congress established the final national origins system in 1929.[25] Thereafter, Congress set the national origins quota at one-sixth of one percent of the 1920 population to arrive at a base figure of 153,714.[26] The 1920s' legislation effectively stopped large-scale immigration to the United States for forty years.

A great reduction in "anti-immigrant hysteria" followed the 1920s' legislation. Yet, the tendency of Americans to intermarry continued among second and third generation Americans.[27] These unions became more visible and accepted in the absence of mass immigration. The effects of such personal assimilation spread and gradually became a recognized and comfortable feature of American life. America began to celebrate immigrants rather than fear them.[28]

The Statue of Liberty was a famous example of the emerging confidence in American assimilative capacity and the resulting embrace of America's immigrant heritage. Originally a gift from France meant to symbolize the Franco-American relationship, the statue symbolized America's "light of liberty" illuminating the world.[29]

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[24] Maldwyn A. Jones, *American Immigration*, 249-55 (2nd ed. 1992).

[25] *Act of July 1, 1929*, ch. 306, 45 Stat.400.

[26] John Higham, *Strangers in the Land: Patterns of American Nativism* 1860-1925 p. 321 (1955).

[27] Arthur M. Schlessinger, Jr., *The Disuniting of America*" 19, 133 (1993).

[28] Ibid.

[29] Thomas A. Aleinikoff, *The Tightening Circle of Membership*, 22 Hastings Const. L.Q. 915 (1995).

Not until the 1930s and 1940s (the very lowest period of 20th century immigration—and the beginning of modern American confidence in assimilation) did the Statue of Liberty begin to represent the immigrant in the eyes of most Americans.[30]

The mechanics of assimilation were very complicated but included such factors as political participation, economic and employment markets, education, residential patterns, economic class, and even factors such as leisure time activities.[31] The relationship between the 1920s' legislation and assimilation was necessary because reduced ethnic conflict and emergent American commonality led directly to the theme of confidence in the American assimilative capacity which the United States Supreme Court in *Plyler*[32] took for granted.

The term "family dynamic" was used to hypothesize that the children of intermarriage help created a "new" culture by assimilating the traits of their parents and relatives with the larger culture to which they were exposed. An important part of this theory was that people who did not intermarry faced pressure to exhibit heightened tolerance and sensitivity toward children of those relatives who did intermarry. Foreign-born immigrants (and "natives") had significant and strong prejudices. Their children had less.

The family dynamic produced various compromises from which "acceptable" social deviation could be judged. This effect accounted for the fact that food, dance, some language, work habits, leisure activities, holidays, etc., tended to be retained longer

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[30] Ibid.

[31] Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 331-336 (1986); quoted in Van De Mark.

with the family (and often adopted throughout society), while rigid prejudices tended to be discarded as "troublesome." Customs that offended relatives "on the other side," or the public, also tended to be dropped. Family solutions to cross-cultural interactions within the family set out how far one deviated from the established norms. Family members carried these new sensibilities with them in their other social interactions and thus began a ripple effect of tolerance. The family dynamic also included influences from the experiences of all family members in the larger society. Thus, assimilation was not a wholesale swap of one cultural form for another.[33] Those who claimed that America had always been a diverse nation, de-emphasized the strong tendency of individuals and families to seek common ground.

Education developed another important nexus between cultural dynamism and value solidification, which benefited from reduced immigration levels. Experts acknowledged the role of education in encouraging individuals to move away from passively accepting predetermined social roles even before the American Revolution.[34] Education also solidified core values even during times of demographic change. During the 1920s, concerned Americans began what was known as the "Americanization" movement in education.[35] Proponents of the Americanization movement often overlooked minority accomplishments and glossed over majority abuses in their push to

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[32] *Plyler*, 457 U.S. at 202 (1982).

[33] Bernard Bailyn, *Education in the Forming of American Society* 49 (1960); quoted in Van De Mark.

[34] Ibid.

[35] Arthur M. Schlessinger, Jr., *The Disuniting of America*, p. 35 (1993).

develop a common social nucleus.[36] Education helped form new social patterns by providing access to middle class professions and by easing social barriers to the extent that intermarriage was common among middle class young people.[37]

The forty-year break in immigration protected, supported, and developed a shifting and evolving "common" culture and, simultaneously, anchored the core values necessary to maintain a workable society. The objectionable racist and eugenic appearance of the 1920s' legislation should not blind us to the positive results of a forty-year immigration lull.[38] Whatever the drafters of the 1920s' legislation intended, it reduced social tensions and sustained the assimilative relationship between intermarriage and core values.

The 1952 Immigration Act

In 1952, the McCarran-Walter Act[39] basically altered the immigration policy of the United States. The 1952 Immigration and Nationality Act (official name) retained the 1920 quota base. It removed racial bias from the setting of national origins quotas since particular immigrants could not be excluded on account of race.[40] The Act also: (1) reaffirmed the national origins quota system; (2) limited immigration from the Eastern Hemisphere while leaving the Western Hemisphere unrestricted; (3) established preferences for skilled workers and relatives of U.S. citizens and permanent resident

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[36] Ibid., p. 53-55.

[37] Karst, as quoted in Van de Mark, p. 335.

[38] Aleinikoff, *The Tightening Circle* , p. 49.

[39] McCarran-Walter Act, ch.477, 66 Stat. 163, 8 U.S.C. § 1101 et seq. as amended throughout 8 U.S.C.

[40] Ibid.

aliens; and (4) tightened security and screening standards and procedures. President Truman vetoed the Act because it did not go far enough in removing racial bias from the immigration process.[41]

Congress then overrode Truman's veto by a wide margin. In response, President Truman appointed a commission to study immigration after Congress enacted the McCarran-Walter Act. The Commission's report thoroughly re-evaluated the American national identity.[42] The Commission concluded that the McCarran-Walter Act was immoral and exclusionist in an era of emerging civil rights and Cold War challenges.[43] The Commission decided that American society was assimilated enough to ensure social and political stability.[44]

Senator McCarran expressed a different view and maintained that the nation had always been besieged by immigrants and that ending the national origins system would inject further conflict into an ethnically altered United States. "This nation is the last hope of Western Civilization and if this oasis of the world shall be overrun, perverted, contaminated, or destroyed, then the last flickering light of humanity will be extinguished."[45] McCarran truly wished to end racial discrimination in immigration admissions, but he felt that the United States could best serve its mission in the world by

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[41]Ziegler, *An American Dilemma*, pp. 105-115.

[42] Ibid., p. 109.

[43] Ibid., pp. 108-10.

[44] Ibid.

[45] Congressional Record, pt. 4, p. 5330 (1952).

remaining true to its culture and by assimilating non-Europeans very slowly.[46] The justifications of cultural unity, which had so concerned Congress, never dominated immigration debates after 1952.

The 1965 Immigration Act

Congress passed the 1964 Civil Rights Act[47] and the 1965 Voting Rights Act[48] that forbid discrimination against individuals and students who were limited in English language proficiency. Congress then passed the 1965 Immigration Act[49], which abolished the national origins formula. Each country outside of the Western Hemisphere received unlimited visas for relatives of citizens and 20,000 visas for ordinary immigrants.[50] The 1965 Immigration Act also set quotas on immigration from the nations of the Western Hemisphere for the first time.[51] The 1965 Act offered a new system for immigrants not related to United States citizens to emigrate.[52]

Senator Edward Kennedy maintained that the new immigration laws would not lead to a flood of non-European immigration nor upset the ethnic mix of the United States.[53] Attorney General Nicholas Katzenbach reassured doubters by stating, with

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[46] Ibid.

[47] *Civil Rights Act of 1964*, Pub. L. No. 88-352, 78 Stat. 241.

[48] *Voting Rights of 1965*, Pub. L. no. 89-110, 79 Stat. 437.

[49] *Immigration Act of 1965*, Pub. L. No. 89-235, 79 Stat. 911.

[50] Bill Ong Hing, *Making And Remaking Asian America Through Immigration Policy*, 1850-1990. 38-41 (1993).

[51] *Immigration Act of 1965*, Pub. L. No. 89-235, 79 Stat. 911

[52] Ibid.

[53] Nathan Glazer, ed., *Clamor At The Gates: The New American Immigration*, CICS Press, pp. 6-7, (1985).

some condescension, that population pressures in what is now termed the Third World would not encourage emigration;[54] he could not have been more wrong.[55]

Congress designed the 1965 Act to provide a level playing field among emigrant-sending nations without concentrating on any one region.[56] The 1965 Act was not designed to transform the culture or the demographic character of the United States. Yet, the actual effects of the 1965 Act were dramatic.[57] Because of the family reunion policies, the first immigrants who came into the United States after the 1965 Act clogged the system through "chain migration" of relatives, who in turn brought in their relatives and created an enormous backlog of people waiting to be processed.[58] As a result of the surge in immigration and refugees from Third World nations after 1965, over eighty percent of annual legal entrants to the United States were from Latin America, the Pacific Islands, and Asia.[59]

Immigration resulting from the 1965 Immigration Act altered the demographic makeup of the United States over a mere thirty-year period. In 1960, one out of ten

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[54] David Rieff, *Los Angeles: Capital Of The Third World*, Harcourt Brace: New York, pp. 178-180 (1991).

[55] Population growth and migration pressures in the Third World provide the strongest contributions to the immigration problem. See, e.g., United Nations Population Fund, The State Of World Population 1993 (1993).

[56] *Immigration Act of 1965,* Pub. L. No. 89-235, 79 Stat. 911.

[57] Almost 3 million Hispanics immigrated during the 1980s, contrasted with about 1.5 million during the 1970s. The Hispanic population increased by 53%. (By comparison the number of non-Hispanic African-Americans increased by 13%. The United States also admitted 315,000 immigrants from Africa and Haiti during the 1980s. Between 1980 and 1990, the Asian-American population grew by 107.8%. Immigration And Naturalization Service, U.S. Department Of Justice 1990 Statistical Yearbook 50 (1991) [hereinafter Statistical Yearbook].

[58] Peter Brimelow, *Alien Nation: Common Sense About America's Immigration Disaster*, p. 81 (1995).

[59] Ibid., pp. 77-84.

Americans was non-white.[60] According to the 1990 census, one out of four Americans claims to be non-white. The United States no longer consists of an overwhelming white majority, with significant minorities of blacks, and to a lesser and more localized degree, Hispanics, American Indians, and Asians.[61]

Immigration Policy After 1965

Congress made several substantive changes to immigration policy after 1965. The Immigration Reform and Control Act of 1986[62] (IRCA) granted amnesty to certain illegal immigrants and mandated employer sanctions for those hiring illegal immigrants as a way to deter future arrivals.

The Immigration Act of 1990[63] increased the number of available immigrant visas to 700,000, from the prior limit of 490,000, for fiscal years 1992-93 and 1993-94, and to 675,000 thereafter. Therefore, proposals to cut immigration by one-third did nothing more than re-establish the immigration levels of the 1980s, the highest ever in the country's history up to that time.

Immigrants arrived through a complicated system comprised of legal immigration, family-based immigration, skills-based immigration, nationality-based visas, refugees and asylum seekers, miscellaneous immigration, and illegal immigration.[64] Third World

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[60] Bureau Of The Census, U.S. Department Of Commerce, Census Of Population 1960, Characteristics Of The Population, pt. 1, at 145, tbl. 44 (1964).

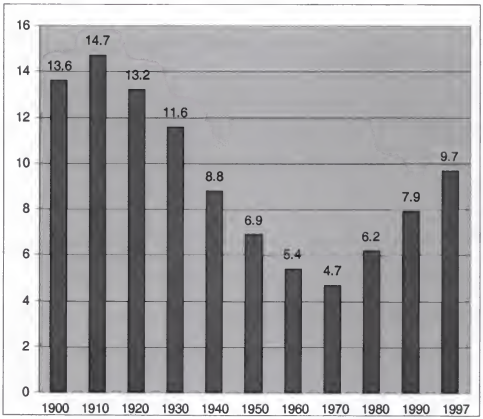
[61] Ibid.

[62] *Immigration Reform and Control Act*, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[63] *The Immigration Act of 1990*, Pub. L. No. 101-649 §§ 111-124, 104 Stat. 4978-97 (1990).

[64] Brimelow, *Alien Nation*, pp. 33-35. Estimates ranged from 300,000 to 500,000 per year:

immigrants, because of refugees,[65] and above all, family re-unification policies,[66] comprised the vast majority of the immigration backlog.[67]



Source: U.S. Census Bureau, Current Population Survey, March 1999.

Figure 2-1 U.S. Foreign-Born Population

[65] Hing, *Making and Remaking Asian America*, pp. 12-28.

[66] Family re-unification effectively excluded European immigrants because relatively fewer Americans still had close family in Europe. Brimelow, *Alien Nation*, at 78-84. In contrast, the vast majority of Asian and Latin American immigrants arrived after the passage of the 1965 Act or were descended from post-1965 immigrants. Brimelow, *Alien Nation*, pp. 78-84.

[67] Scott McConnell, *The New Battle over Immigration*, Fortune, p. 98, May 9, 1988.

Educating Illegal Immigrant Children

Meyer v. Nebraska[68] was a 1923 U.S. Supreme Court decision that overrode an earlier Nebraska statue that barred individuals and schools from providing instruction in a language other than English to any student who had not completed the eighth grade. The defendant in *Meyer* was a teacher in a parochial school in a Lutheran church who taught German language to a ten-year-old boy who had not passed the eighth grade. The text used, a book of biblical stories written in German, was for the purpose of giving religious instruction in English.[69] Their plan, according to the pastor, was simply to have their children learn enough German to be able to worship together as a family.

The *Meyer* decision put a stop to what had become a national trend. Nebraska had passed its English-only statute in 1919, and fourteen other states had followed its lead. Some had gone so far as to declare English (or "American") to be their official language. The decision in *Meyer* gave educators the right to use a language other than English in the classroom.

The Refugee Act of 1980,[70] provided funding for such programs as English for Speakers of Other Languages (ESOL or ESL). This program allowed immigrant students to be taught in their native language at a public school. The Consent Decree of 1990[71] mandated surveying immigrant students to determine their level of need for language

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[68] *Meyer v. Nebraska* 262 U.S. 390 (1923).

[69] Ellis Cose, *A Nation of Strangers: Prejudice, Politics and the Populating of America.* New York: Wm. Morrow & Company, Inc., 1992.

[70] Refugee Act of March 17, 1980, *Immigration and Nationality Act*, [101(a)(42)(A)].

[71] Florida Department of Education. (1996a). *1990 League of United Latin American Citizens (LULAC) et al. v. State Board of Education Consent Decree.* Tallahassee, FL: Office of Multicultural Student Language Education.

services in order to learn English and to provide those services as part of the education program.

Immigration policy up to 1965, did not address the aspect of educating the children of immigrants, legal or illegal. Each state had their own laws (or none) regarding the education of immigrants and other "suspect" classes. The education of illegal immigrant children did not become an issue until the decade of the 1970s in Texas, and then it became a problem.

Plyler v. Doe[72] represented the epitome of confidence in America's assimilative capacity. The United States Supreme Court held that states could not deny a free public education to the foreign born children of illegal immigrants.[73] In *Plyler*, the Court considered the Texas statute[74] prohibiting state-funded public education to children of illegal aliens. James Plyler was the Superintendent of the Tyler Independent School

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[72] *Plyler*, 457 U.S. at 202 (1982).

[73] Ibid., p. 230.

[74] TEXAS EDUCATION CODE ANN. § 21.03 (Vernon Supp. 1981) *cited in Plyler*, 457 U.S. at 201 n.1.

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such persons or his parent, guardian or person having lawful control resides within the school district.

District, which was named in the case by "certain named and unnamed undocumented alien children."[75]

Mexican children who had entered the United States illegally and resided in Texas sought injunctive relief against exclusions from public schools pursuant to a Texas statute and school district policy. The United States District Court for the Eastern District of Texas,[76] William Wayne, Justice, permanently enjoined defendants, and the defendants appealed. The Court of Appeals for the Fifth Circuit[77] affirmed. Probable jurisdiction was noted.

The Supreme Court, under Justice Brennan,[78] in the majority opinion, held that: (1) the illegal aliens who were the plaintiffs could claim the benefit of the equal protection clause, which provided that no state could deny to any person the benefit of jurisdiction in the equal protection of the laws; whatever his status under the immigration laws, an alien was a 'person" in any ordinary sense of that term. This Court's prior cases recognized that illegal aliens were "persons" protected by the Due Process Clauses of the Fifth and Fourteenth Amendments, which Clauses do not include the phrase "within its jurisdiction," could not be distinguished on the asserted ground that persons who had entered the country illegally were not "within the jurisdiction" of a State even if they were present within its boundaries and subject to its laws. Nor did the logic and history of the Fourteenth Amendment support such a construction. Instead, use of the phrase "within

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[75] Ibid.

[76] 458 F. Supp. 567.

[77] 628 F. 2d 448.

[78] *Plyler,* 457 U.S. 245.

its jurisdiction" confirmed the understanding that the Fourteenth Amendment's protection extended to anyone, citizen or stranger, who was subject to the laws of a State, and reached into every corner of a State's territory; (2) the discrimination contained in the Texas statute which withheld from local school districts any state funds for the education of children who were not "legally admitted" into the United States and which authorized local school districts to deny enrollment to such children could not be considered rational unless it furthered some substantial goal of the state. Although undocumented resident aliens could not be treated as a "suspect class," and education was not a "fundamental right," so as to require the State to justify the statutory classification by showing that it served a compelling governmental interest, the Texas statute did impose a lifetime hardship on a discrete class of children not accountable for their disabling status. These children could neither affect their parents' conduct nor their own undocumented status. The deprivation of public education was not like the deprivation of some other governmental benefit[79]. Public education had a pivotal role in maintaining the structure of our society and in sustaining our political and cultural heritage; the deprivation of education took an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and posed an obstacle to individual achievement. In determining the rationality of the Texas statute, its costs to the Nation and to the innocent children could properly be considered; (3) the undocumented status of the children *vel non* did not establish a sufficient rational basis for denying the benefits that the state afforded other residents. It was true that, when faced with an equal protection challenge respecting a State's differential treatment of aliens, the courts needed to be attentive to

[79] *Plyler,* 457 U.S. 203

congressional policy concerning aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the legislative record, no national policy was perceived that might justify the State in denying these children an elementary education; (4) there was no national policy that might justify the state in denying the children an elementary education; and (5) the Texas statute could not be sustained as furthering its interest in the preservation of the state's limited resources for the education of its lawful residents. While the State did have an interest in mitigating potentially harsh economic effects from an influx of illegal immigrants, the Texas statute did not offer an effective method of dealing with the problem. Even assuming that the net impact of illegal aliens on the economy was negative, charging tuition to undocumented children constituted an ineffectual attempt to stem the tide of illegal immigration, at least when compared with the alternative of prohibiting employment of illegal aliens. Nor was there any merit to the suggestion that undocumented children were appropriately singled out for exclusion because of the special burdens they imposed on the state's ability to provide high-quality public education. History did not show that exclusion of undocumented children was likely to improve the overall quality of education in the State. Neither was there any merit to the claim that undocumented children were appropriately singled out because their unlawful presence within the United States rendered them less likely than other children to remain within the State's boundaries and to put their education to productive social or political use within the State.[80]

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[80] *Plyler*, 457 U.S. 246.

The Court recognized that "education was not a right" the constitution granted individuals.[81] Additionally, the Court rejected the premise that the children comprised of a suspect class qualified for full rights as Americans.[82] Illegal alien children, unlike members of racial groups, were not a protected subclass because their classification resulted from voluntary criminal decisions on the part of their parents to reside in the United States. Yet, the Court referred to the role American education played in transmitting "our" American values and maintaining the democratic nature of "our" political system.[83] The Court stated: "We have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government,' . . . and as the primary vehicle for transmitting 'the values on which our society rests,' . . . 'In sum, education has a fundamental role in maintaining the fabric of our society.'"[84]

The *Plyler* Court used "our" in a very special sense. The Court implied that in 1982 there was an "our" on which most could basically agree and which encompassed political, social, and educational values.

The Court's majority determined that "equal protection" under the Fourteenth Amendment "was not confined to the protection of citizens." Both the equal protection and the due process clauses of the Constitution, the court declared, "are Universal in their application, to all persons within the territorial jurisdiction, without regard to any

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[81] *Plyler*, 457 U.S. at 221 (citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 [1973]).

[82] Ibid., p. 223.

[83] Ibid., pp. 221-223.

[84] Ibid., p. 221.

differences of race, color, or of nationality; and the protection of the laws was a pledge of the protection of equal laws."[85]

The Court's majority opinion in *Plyler v. Doe*, given by Justice Brennan, contained rather dramatic and elegant language highlighting the public-interest aspects involved. Penalizing children for the illegal entry of their parents would have marked them with the "stigma of illiteracy for the rest of their lives."[86] If education in the United States was not a fundamental right, the opinion continued, "neither was it merely some governmental 'benefit' indistinguishable from other forms of social welfare." Also underlined by the Court majority was that education was "the most vital civic institution for the preservation of a democratic system of government" and that "we cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[87] They added, "It is . . . clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation."[88]

The majority further acknowledged that illegal aliens might have a negative net impact upon the economy, but did not buy the argument that barring their children from public education would have the effect of discouraging illegal entries, "at least when compared with the alternative of prohibiting employment of illegal aliens." The majority further indicated that they would not be impressed even if the state could have proven that

[85] *Yick Wo v. Hopkins*, 118 U.S. 369, (1886).

[86] *Plyler*, 457 U. S. 224.

[87] Ibid., p. 221.

the quality of public education was improved by excluding a certain group of children from educational opportunities. The state, they reasoned, had not justified its selection of the particular group.[89]

As a result of the Supreme Court's decision,[90] no school in the United States could legally deny immigrant students admission on the basis of their undocumented status, nor could they treat undocumented students differently than any other student.

Justices White, Rehnquist, and O'Connor joined Chief Justice Burger in his dissention of the ruling.[91] In the minority, they felt that it was senseless for an enlightened society to deprive any children – including illegal alien – of an elementary education. However, "the Constitution did not constitute us as 'Platonic Guardian,' nor did it vest in the Court the authority to eliminate laws because they did not meet our standards of desirable social policy, 'wisdom,' or 'common sense.'"[92] (See APPENDIX for further clarification.)

The minority of the Court had no problem with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applied to illegal aliens who were physically "within the jurisdiction" of a state.[93] The Equal Protection Clause did not

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[88] Ibid., p. 230.
[89] Martha McCarthy, "The Right to an Education: Illegal Aliens." *Journal of Educational Equity and Leadership 2* (Summer 1982): 283-85.

[90] *Plyler,* 457 U.S. 245.

[91] Ibid.

[92] *TVA v. Hill*, 437 U.S. 153, (1978).

[93] *Plyler,* 457 U.S. 215.

mandate identical treatment of different categories of persons.[94] The issue was whether, for purposes of allocating resources, a state had a legitimate reason to differentiate between persons who were lawfully within the state and those who were not.[95] Therefore, the distinction drawn by Texas, based not on its own legitimate interests but on the classifications by the Federal Governments' immigration laws and policies, was not unconstitutional.

The Court had recognized that, in allocating governmental benefits to a given class of aliens, one "may take into account the character of the relationship between the alien and the country."[96] When that "relationship" was a federally prohibited one, there could be no presumption that a state had a constitutional duty to include illegal aliens among the recipients of its governmental benefits.[97]

The Court held many times that the importance of a governmental service did not elevate it to a "fundamental right" for purposes of equal protection analysis.[98] In *San Antonio Independent School District*, Justice Powell, speaking for the court, expressly rejected the proposition that state laws dealing with public education were subject to special scrutiny under the Equal Protection Clause. The Court further indicated there was

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[94] *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Reed v. Reed*, 404 U.S. 71, 75 (1971).
[95] *Plyler*,457 U.S. 224.

[96] *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

[97] *Plyler*, 457 U.S. 247

[98] *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 301 (1973); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972).

no meaningful way to distinguish between education and other governmental benefits.[99] Was education more "fundamental" than food, shelter, or medical care?

The Federal Government excluded illegal aliens from numerous social welfare programs, such as the food stamp program,[100] old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs,[101] the Medicare hospital insurance benefits program,[102] and the Medicaid hospital insurance benefits for the aged and disabled program.[103] Although these exclusions did not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tended to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents.[104]

The Court maintained, "Barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools."[105] However, the legitimacy of barring illegal aliens from programs such as Medicare or Medicaid did not depend on a showing that the barrier would "improve the quality" of medical care given to persons lawfully entitled to participate in such programs. Education, like

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[99] *Plyler,* 457 U.S. 248.

[100] 7 U.S.C. 2015(f) (1976 ed. and Supp. IV) and 7 CFR 273.4 (1981).

[101] 45 CFR 233.50 (1981).

[102] 42 U.S.C. 1395i-2 and 42 CFR 405.205(b) (1981).

[103] 42 U.S.C. 1395o and 42 CFR 405.103(a)(4) (1981).

[104] *Mathews v. Diaz,* 426 U.S. 80.

[105] *Plyler,* 457 U.S. 252: See 458 F.Supp. 569, 577 (ED Tex.1978).

medical care, was enormously expensive, and there could be no doubt that very large added costs would fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools.

Justice Burger went on to say that "Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public school may well outweigh the costs of educating them."[106] But that was not the issue: the fact that there were sound policy arguments against the Texas Legislature's rule did not make it unconstitutional.[107]

Justice Burger saw the ruling as a quick fix for the failings of the political processes. He felt that better enforcement of immigration laws and policies would have prevented the need to rule on the right of illegal children to a free education.[108]

The court suggested that "our" institutions had confidently and successfully undertaken similar challenges. In *Plyler*, confidence in undertaking tough educational missions, analogous to those in prior decisions such as *Meyer v. State of Nebraska*,[109]

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[106] *Plyler,* 457 U.S. 253.

[107] Ibid.

[108] Ibid.

[109] In *Meyer v. State of Nebraska,* 262 U.S. 390 (1923) the United States Supreme Court upheld the right of parents and teachers to arrange foreign language instruction for children and struck down a Nebraska statute prohibiting foreign language instruction to children before the eighth grade (see Neb. Laws 1919, CH. 249). The Court stated: "It is the natural duty of the parent to give his children education suitable to their station in life . . . "(400). The Court saw no harm in German language instruction to children when the children's parents did not contest the right of the state to reasonably regulate schools, compel attendance, and prescribe a curriculum for state-supported institutions. (*Meyer, pp.* 402-03).

Pierce v. Society of Sisters,[110] and *Brown v. Board of Education*[111] prevailed over the public interest doctrine revitalized in *Ambach v. Norwick*.[112]

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[110] In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the United States Supreme Court extended the *Meyer* reasoning to protect the right of private institutions to educate children. The Court invalidated an Oregon statute prohibiting private education of "normal" children within a reasonable distance from a public school (see Laws Or. 1923, p.9). The Court noted that it was within the state's power to reasonably regulate schools, to require that teachers be of "good moral character and patriotic disposition," or to require the teaching of certain subjects "plainly essential to good citizenship." However, the Court held that the states had no general power to "standardize its children by forcing them to accept instruction from public teachers only." (Pierce, pp. 534-535).

[111] It was not until 1954, in *Brown v. Board of Education*, 347 U.S. 483, however, that the United States Supreme Court had the confidence to tackle one of the most enduring and debilitating problems in American life: the doctrine of separate but equal education.. At last, stated the Court, America must use its mature and successful institutions to include all Americans:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. Today, education is perhaps the most important function of the state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right Which must be made available to all on equal terms. Ibid. pp. 492-93.

[112] In *Ambach v. Norwick*, 441 U.S. 68 (1979), the United States Supreme court upheld a New York statute denying public school teaching positions to aliens who were eligible for citizenship but refused to naturalize. The Court noted that state power to enact classifications based on alienage had narrowed to the point of being "inherently suspect and subject to close judicial scrutiny" (Ibid. pp. 72-73 [internal citations omitted]). Nevertheless, the Court acknowledged that states have some functions so entwined with state governmental operations so as to allow exclusion of aliens under the still extant public interest doctrine (Ibid., pp. 73-74).
Citing *Brown*, *Society of Sisters*, and *Meyer*, the Court stressed the importance of education to our democratic society and to our culture (Ibid., pp. 76-77 [other internal citation omitted]). Moreover, the Court cited numerous authorities regarding the inculcating and democratizing role of the "public schools as an 'assimilative force' by which diverse and conflicting elements of our society are brought together on a broad but common ground." (Ibid., pp. 77-78). Additionally, the court recognized the special role that teachers play in the education of children as well as the wide latitude teachers have in the manner information is communicated to students as a rationale for a state to put reasonable requirements on teachers (Ibid., pp. 78-79). Once again, the court had acknowledged the nexus between cultural dynamism and core values.

The *Plyler* Court cited *Ambach* to emphasize the importance of transmitting fundamental values to children.[113] In *Ambach*, however, the Court stressed the fundamental role of education in a manner which vindicated the right of states to better control those who taught our children, even to the extent of excluding resident alien teachers.[114] Whereas *Ambach* concentrated on how the state transmitted values, and through whom, *Plyler*, in fact, focused on those who received fundamental values. In attempting to reconcile *Ambach* and *Plyler*, the question became whether teaching children who have no legal right to be in the country creates less of a concern than the possibility that an alien teacher legally present in the United States may teach in public schools?[115]

The following timeline delineated United States immigration laws and policies since 1790. The dates illustrated in bold indicate laws or policies of relevance to the education of immigrant children. The first ruling of any significance to immigrant education came in 1923 with *Meyer v. Nebraska*.[116] Most of these rulings were discussed within the context of this paper.

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[113] *Plyler*, 457 U.S. at 221-23 (citing *Ambach*, 441 U.S. at 760).

[114] *Ambach*, 441 U.S. at 77-79.

[115] *In Ambach*, Justice Powell did not require evidence proving or disproving whether (legally resident) alien teachers negatively affected the New York schools in any way: The issue was the public-interest doctrine and the right of the state to regulate a sensitive public sphere. In contrast, Justice Brennan emphasized the scant proof of negative economic impacts on Texas schools resulting from teaching the children of illegal immigrants (*Plyler*, 457 U.S. at 228, 229). Justice Powell, who wrote the majority decision in *Ambach* but concurred in *Plyler*, gave no clue why he did not use the public-interest doctrine in *Plyler* other than emphasizing that the affected parties were children (*Plyler*, 457 U.S. pp. 236-240 [Powell, J., concurring]). Justice Powell's only mention of the concerns of ordinary citizens was the bland statement that he was "not unmindful of what must be the exasperation of responsible citizens and government authorities in Texas and other States similarly situated." (Ibid., p. 240 [Powell, J., concurring]).

[116] *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

Table 2-1 Timeline of U.S. Immigration and Alien Education Policies

1790	**Naturalization Rule** adopted. Federal government established a two-year residency requirement on immigrants wishing to become u.s. citizens.
1819	**Reporting Rule** adopted. Data began to be collected on immigration into the United States. Ships' captains and others were required to keep and submit manifests of immigrants entering the U.S.
1875	**First Exclusionary Act**. Convict, prostitutes, and "coolies" (Chinese contract laborers) were barred from entry into the United States.
1882	**Immigration Act** passed. The federal government moved to firmly establish its authority over immigration. Chinese immigration was curtailed; ex-convicts, lunatics, idiots, and those unable to take care of themselves were excluded. In addition, a tax was levied on newly arriving immigrants.
1885	**Contract laborers'** entry barred. This legislation reversed an earlier federal law legalizing the trade in contract labor.
1891	**Office of Immigration** created. Established as part of the U.S. Treasury Department, this new office was later given authority over naturalization and moved to the U.S. Justice Department. (It was known as the Immigration and Naturalization Service.) In the same year, paupers, polygamists, the insane, and persons with contagious diseases were excluded from entry to the United States.
1892	**Ellis Island** opened. Between 1892 and 1953, more than 12 million immigrants were processed at this one facility.
1903	**Additional categories** of persons excluded. Epileptics, professional beggars, and anarchists were now excluded.
1907	**Exclusions** further broadened. Imbeciles, the feebleminded, tuberculars, persons with physical or mental defects, and persons under age 16 without parents were excluded.
1907	**"Gentleman's Agreement"** between United States and Japan. An informal agreement curtailed Japanese immigration to the United States. Also, the tax on new immigrants was increased.
1917	**Literacy Test** introduced. All immigrants 16 years of age or older must have demonstrated the ability to read a forty-word passage in their native language. Also, virtually all Asian immigrants were banned from entry into the United States.
1921	**Quota Act**. An annual immigration ceiling was set at 350,000. Moreover, a new nationality quota was instituted, limiting admissions to 3 percent of each nationality group's representation in the 1910 census. The law was designed primarily to restrict the flow of immigrants coming from eastern and southern Europe.
1923	***Meyer v. Nebraska***. U.S. Supreme Court decision struck down an earlier Nebraska statute barring individuals and schools from providing instruction in a language other than English to any student who had not completed the eighth grade.
1924	**Origins Act**. The Act reduced the annual immigration ceiling to 165,000. A revised quota reduced admissions to 2 percent of each nationality group's representation in the 1890 census. The U.S. Border Patrol was created.
1927	**Immigration Ceiling** Further Reduced. The annual immigration ceiling was further reduced to 150,000; the quota was revised to 2 percent of each nationality's representation in the 1920 census. This basic law remains in effect through 1965.

Table 2-1--continued.

1929	**National Origins Act**. The annual immigration ceiling of 150,000 was made permanent, with 70 percent of admissions slated for those coming from northern and western Europe, while the other 30 percent were reserved for those coming from southern and eastern Europe.
1948	**Displaced Persons Act**. Entry was allowed for 400,000 persons displaced by World War II. However, such refugees must have passed a security check and had proof of employment and housing that did not threaten U.S. citizens' jobs and homes.
1952	**McCarran-Walter Act.** The Act consolidated earlier immigration laws and removed race as a basis for exclusion. In addition, the Act introduced an ideological criterion for admission: immigrants and visitors to the United States could be denied entry on the basis of their political ideology (e.g., if they were Communists or former Nazis).
1964	**Civil Rights Act of 1964**. Title VI forbid discrimination against students who were limited in their English proficiency.
1965	**Immigration Act** was amended. Nationality quotas were abolished. However, the Act established an overall ceiling of 170,000 on immigration from the Eastern Hemisphere and another ceiling of 120,000 on immigration from the Western Hemisphere.
1974	***Lau v. Nichols***. The U.S. Supreme Court held that the failure of the San Francisco school system to provide for the lingual needs of non-English speaking Chinese students violated section 601 of the Civil Rights Act of 1964.
1974	**Equal Educational Opportunities Act of 1974**. Required school districts to remove barriers to non-English speaking students' access to equal educational opportunities.
1975	**Texas Education Code** prohibited the education of nonresident aliens.
1978	**Worldwide immigration ceiling** introduced. A new annual immigration ceiling of 90,000 replaced the separate ceilings for the Eastern and Western Hemispheres.
1979	***Ambach v. Norwick***. Teaching certificates could only be given to U.S. citizens.
1980	**Refugee Act**. A system was developed to handle refugees as a class separate from other immigrants. Under the new law, refugees were defined as those who fled a country because of persecution "on account of race, religion, nationality, or political opinion." The president, in consultation with Congress, was authorized to establish an annual ceiling on the number of refugees who may enter the United States. The president also was allowed to admit any group of refugees in an emergency. At the same time, the annual ceiling on traditional immigration was lowered to 270,000.
1982	***Plyler v. Doe***, 457 U.S. Case which determined that undocumented alien children were entitled to a free public education and protection under the Fourteenth Amendment.
1989	***Teresa P. v. Berkeley Unified School District.*** California federal district court found that the Berkeley schools' English-based bilingual education program did not violate federal law.
1986	**Immigration Reform and Control Act**. The annual immigration ceiling was raised to 540,000. Amnesty was offered to those illegal aliens able to prove continuous residence in the U.S. since January 1, 1982. Stiff sanctions for employers of illegal aliens.
1990	**Immigration Act of 1990**. The annual immigration ceiling was further raised to 700,000 for 1992, 1993, and 1994; thereafter, the ceiling would drop to 675,000 a year. Ten thousand permanent resident visas were offered to those immigrants agreeing to invest at least $1 million in U.S. urban areas or $500,000 in U.S. rural areas. The McCarranWalter Act of 1952 was amended so that people could no longer be denied admittance to the United States on the basis of their beliefs, statements, or associations.

1994	**Proposition 187.** Law would deny illegal aliens all public services including education. The Supreme Court ruled it unconstitutional in 1997.
1996	**Immigration Act.** Congress voted to double the U.S. Border Patrol to 10,000 agents over five years and mandated the construction of fences at heavily trafficked areas of the U.S.-Mexico border. A program to check the immigration status of job applicants.
1996	**Immigrants lose benefits**. President Clinton signed welfare reform bill. Legal immigrants lost their right to food stamps and Supplemental Security Income. Illegal immigrants became ineligible for virtually all federal and state benefits except emergency medical care, immunization programs, and disaster relief.

Source: Summary of U.S. Immigration Law, Close-Up Foundation Special Topic Page, July 1998.

Summary

In the 1920s, legislators responded to social tensions by enacting restrictive immigration laws. In the relatively tranquil society, which resulted from reduced immigration in the ensuing years, Americans began to have more confidence in their institutions and values through the decades of the 40s and 50s. By 1965, the very success of the immigration lull led many Americans to believe that American institutions could accommodate any level of diversity. The United States Congress confidently, chose to change immigration policy in 1965.[117]

After liberalization of American immigration laws in the 1960s, mass immigration to the United States began again and continued without significant debate on the issues of social cohesion, which so dominated earlier immigration discussions. Public schools were one of the first institutions to confront the consequences of American immigration laws and the lack of enforcement of those laws. With corresponding confidence in American institutions and values, the United States Supreme Court in 1982 forced public schools to confront the challenge of illegal immigration.[118]

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[117] Immigration Act of 1965, Pub. L. No. 89-235, 79 Stat. 911.

[118] *Plyler*, 457 U.S. 202.

Illegal immigrant education legislation was historically in favor of providing said education to all students in residence in a given state, whether legal or otherwise, and in a language conducive to their learning success.

Given the laws and trends in immigration, educators in every sector expected a substantial share of their students to come from other countries. Immigration in both its legal and illegal manifestations continued to rise to higher levels than ever before in the nation's history.

Although a larger number of highly educated immigrants were on their way, an even greater flow of illegal immigrants enlarged the nations' pool of illiterate or poorly educated residents. The continued emphasis on family reunification also brought large numbers of immigrants who tended to have less education that the original entrants. Educators in the United States needed to be ready to serve an even more diverse clientele in its future.

CHAPTER 3
IMMIGRATION LAWS AND PROPOSITION 187

Introduction

This chapter reviews the major immigrant education laws and policies of the last half of the nineteenth century. It discusses ways in which each are based on precedent policy and how they are associated. Of particular concern are *Plyler v. Doe*[1] and California's Proposition 187.[2]

Background

The earliest immigration laws were designed to protect the populace. Criminals, prostitutes, and other undesirables were prohibited from entering the United States. Exclusionary practices were implemented to keep certain nationalities from entering on a permanent basis. Finally, immigration laws were adapted to achieve acceptable levels of immigration to ensure that the United States could assimilate the new population comfortably.

The immigration laws of the United States divided all people in the world into two groups: "United States nationals" and "aliens."[3] Almost all nationals also carried

[1] *Plyler v. Doe*, 457 U.S. 202 (1982).

[2] Proposition 187 was approved by the electors of California on November 8, 1994, as an initiative statute. See 1994 Cal. Legis. Serv., Prop. 187, (Westlaw).

[3] Immigration and Nationality Act, (INA), Public Law 82-414, [s 101(a)(3)], 8 U.S.C. [s 1101(a)(3)] (1994), defines "alien" as "any person not a citizen or national of the United States." Since all citizens are nationals, the definition of "alien" could easily read "any person not a national of the United States."

the title "citizen." Aliens in turn were divided into two subgroups: immigrants and nonimmigrants. A nonimmigrant was any alien who could prove that he or she fell into one of the statutorily enumerated categories of temporary visitors, such as students, tourists, business visitors, or temporary workers.[4] All other aliens were immigrants[5] and therefore subject to the more rigorous standards applicable to those who sought permanent residence in the United States.

Immigrants themselves were sub-classified. There were those who were "lawfully admitted for permanent residence,"[6] holders of so-called "green cards." And there were those who were here unlawfully, having entered illegally, overstayed, or otherwise violated the terms of temporary admission (undocumented or illegal immigrants). There was an additional hybrid category known as aliens "Permanently Residing Under Color of Law," or PRUCOLs.[7] While the definition of PRUCOL varied from one program to another, the term typically encompassed those who had received asylum, some of those who had been paroled from prison into the United States, and miscellaneous others who remained in the United States with the knowledge and permission of the Immigration and Naturalization Service (INS) and whom the INS did not intend to remove.[8] The most general observation was that the major federal and state

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[4] Immigration and Nationality Act, Public Law 82-414, (INA) [s 101(a)(15)], 8 U.S.C. [s 1101(a)(15)] as amended (1994).

[5] Ibid.

[6] Ibid., [s 101(a)(20)].

[7] U.S. Commission on Immigration Reform, U.S. Immigration Policy: Restoring Credibility 139-43 (1994) [hereinafter CIR]; includes certain Cubans and Haitians and aliens whose deportations have been withheld or stayed.

[8] Ibid.

benefit programs were open to United States citizens and to those aliens who had been lawfully admitted as permanent residents.

In addition, several important programs, including Aid to Families with Dependent Children (AFDC)[9], Supplemental Security Income (SSI)[10] and Medicaid,[11] covered PRUCOLs.[12]

To be admitted to the United States in any capacity, an alien needed to prove he or she was not "likely at any time to become a public charge."[13] A common way to establish that was to submit an "affidavit of support" from an American sponsor, who was willing and able to provide financial backing. For purposes of assessment of financial eligibility under various federal benefit programs, however, a portion of the

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[9] *Aid to Families with Dependent Children* (AFDC). The AFDC program provided assistance for basic needs such as food and shelter to qualifying families with children. The families met certain income, immigration status and other qualifications to receive AFDC. The federal government and the states jointly funded the program. Those persons not eligible included undocumented aliens and those undocumented aliens who became legalized as a result of 1986 IRCA.

[10] *Supplemental Security Income* (SSI). Aged, blind, and disabled persons whose income fell below specified levels received cash payments under the Supplemental Security Income program. As SSI eligible residents were automatically eligible for Medicaid, any change in such status and denial of Medicaid had an impact on health care costs for local providers.

[11] *Medicaid.* Medicaid was a joint state/federal program designed to provide medical assistance to financially needy individuals. The program was an automatic benefit for those individuals who received AFDC or SSI direct assistance. Potential recipient families met certain income, citizenship and other qualifications to receive Medicaid. Individuals not eligible included undocumented aliens and former undocumented aliens who became legalized as a result of the 1986 IRCA. Except for emergency Medicaid coverage which included emergency labor and delivery.

[12] CIR.

[13] Ways And Means Committee Print: 104-14 [1996 Green Book] "Appendix J. Noncitizens" *The Personal Responsibility and Work Opportunity Reconciliation Act and Associated Legislation*, 1996, <http://www.access.gpo.gov/cgi> (25 February 1997). "Public charge" was a term used in immigration law to describe someone who was, or likely to become, dependent on public benefits. In practice, public charge considerations have historically been a factor in the admissibility of aliens.

alien's income and resources was "deemed" to include those of the affiant for a certain number of years after the alien's admission. [14]

In contrast to both lawfully admitted permanent residents and PRUCOLs, undocumented immigrants were ineligible for federal and state benefit programs.[15] There were some exceptions, typically for emergency services, those services for which denial would endanger the general public, and any services that had been held to be constitutionally required. Examples included emergency medical, immunization programs, and public education.[16]

In the movement to strip undocumented immigrants of the few public benefits for which existing laws left them eligible, there were many generic arguments already discussed. There were also a number of additional points specific to undocumented immigrants.[17]

The principal argument for withholding public benefits from undocumented immigrants was that they were in the United States illegally.[18] As wrongdoers, the argument went, they had no moral claim to receive services from the very government whose laws they had transgressed. The analogy was to a trespasser seeking support from the landowner whose property he or she had wrongfully entered.[19]

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[14] Ibid., pp. 129-31 (three years for AFDC and Food Stamps; five years for SSI).

[15] CIR., pp. 115-17.

[16] Ibid.

[17] 42 UCLA L. Rev. 1453, *1467.

[18] Ibid., p. 29.

[19] Ibid.

For similar reasons, some lawmakers saw the denial of public benefits as a demonstration of governmental disapproval or even resolve. Without restrictions, it was argued, the government was sending mixed signals. Restrictions confirmed that the government took its immigration laws seriously.[20]

All of these arguments were legitimate, and most people agreed that the government should not extend to undocumented immigrants the full range of benefits available to those who were here legally. However, few people denied that services such as police or fire protection, or emergency medical care were necessary. If pressed, most people thought that undocumented immigrants should receive some benefits but not others. So, the question was where to draw the line.[21]

In addressing the question, various arguments for extending certain benefits to undocumented immigrants were considered. It was not a reasonable assumption to believe that all undocumented immigrants were wrongdoers. Until their cases were adjudicated, their legal status was not settled. Many undocumented immigrants had asylum claims pending for a considerable length of time. Others had legitimate reasons to be in the United States. Further, whatever moral conclusions one reached with respect to adult undocumented immigrants, children were not viewed as morally culpable for accompanying their parents to the United States rather than staying behind, unaccompanied.[22]

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[20] Ibid.

[21] Ibid.

[22] Ibid.

One of the generic arguments against public benefits for immigrants was that such benefits were an unwelcome lure. In the case of undocumented immigrants, a counterargument was that the legally available benefits were too meager to have had that effect; a desire to work, a desire to rejoin their families or to escape persecution, were far more believable explanations.[23]

The public benefits that gave rise to the debate in areas as vital as health and education were central to life opportunity. Depriving a morally innocent child of medical care or an education was considered extreme. Moreover, denying certain benefits to otherwise eligible undocumented immigrants at times caused tangible harm to United States citizen children in the same household, a problem to which even the Commission on Immigration Reform had called attention.[24]

Immigration Laws

Immigration law and policy changed substantially during the 1900s. Historically, immigration policy in the United States was based on a per-country quota system. The first true codification of immigration law resulted from the passage of the Immigration and Nationality Act of 1952.[25] This was the initial attempt to give priority to those immigrants with highly valued skills. Family reunification became a priority in 1965 with the Immigration and Nationality Act amendments.[26] This act also abolished the national quota system, eliminating national origin, race, or ancestry as a basis for

[23] Ibid., p. 30.

[24] 42 UCLA Law Rev. rev. 1470.

[25] Immigration and Nationality Act, Public Law 82-414, (1952).

[26] Immigration and Nationality Act Amendments of October 3, 1965, (79 Stat. 911).

immigration to the United States. The 1986 Immigration Reform and Control Act[27] provided for employer sanctions against businesses that employed undocumented aliens and legalization for qualified undocumented aliens. Immigration policy during the decade of the 1990s was based on The Immigration and Nationality Act, which prioritized eligibility on the basis of family reunification along with the need for immigrants with specific skills.[28]

The Immigration and Nationality Act passed in 1952 over President Truman's veto and remained the foundation for U.S. immigration law at the end of the twentieth century, although it had been amended numerous times.[29] Among the most far-reaching of those amendments, the 1965 Immigration Act marked change in U.S. immigration policy. From the decade of the 1920s until passage of the 1965 law, American immigration policy had operated on a strict per-country quota system. The 1965 law shifted that policy to a system that emphasized family reunification and employment or job skills needed in the U.S. labor market.[30] Besides family-based and employment based immigration, refugees were expressly allowed to immigrate to the United States.

The Refugee Act of March 17, 1980[31] was prompted in large part by the arrival of more than 400,000 refugees from Southeast Asia between 1975 and 1980. The legislation sought to give refugee policy greater consistency by allowing for both a

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[27] *Immigration Reform and Control Act of 1986,* Public Law 99-603.

[28] Immigration and Nationality Act Amendments of October 3, 1965, (79 Stat.911) as amended by the Immigration Act of 1990, P.L. 101-649, (104 Stat. 4978).

[29] James G. Gimpel and James R. Edwards Jr., 1999. *The Congressional Politics of Immigration Reform,* Needham Heights, MA, Allyn & Bacon.

[30] Ibid., p. 60.

[31] Refugee Act of March 17, 1980, *Immigration and Nationality Act*, [101(a)(42)(A)].

regular flow of refugees and emergency admissions. The Refugee Act of 1980 defined "refugee" in U.S. law; it then became section 101(a)(42)(A) of the Immigration and Nationality Act.[32] The 1980 act provided funding for all areas of refugee settlement, and allowed access to such programs as AFDC, ESOL, and vocational and employment related training.[33]

On November 6, 1986, the Immigration Reform and Control Act[34] tackled the growing issue of illegal immigration. In hopes of stemming the entry of illegal aliens, the 1986 act imposed penalties on employers who knowingly hired undocumented workers. It also allowed illegal aliens who had lived in the United States since 1981, as well as undocumented agricultural workers, to become citizens. Under this amnesty program, more than 2.8 million illegal aliens out of approximately 3 million applicants gained legal status by the time all cases were resolved.

The Immigration Act of November 29, 1990[35] raised the limit on annual admissions to 675,000 immigrants. (The 1965 act had set the ceiling at 290,000.) The 1990 law also nearly tripled the number of immigration slots reserved for newcomers with prized job skills and their families. When the revision took effect in 1995, over 71 percent of immigration visas went to family members of U.S. citizens and legal residents; about 21 percent were set aside for well-trained workers and their families; and about 8

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[32] Immigration and Nationality Act, Public Law 82-414. The Immigration and Nationality Act has been amended many times. When Congress enacted a law, it generally did not re-write the entire body of law, or even entire sections of a law, but instead added to or changed specific words within a section. These changes were then reflected within the larger body of law.

[33] *The Unfair Burden*, Florida Governor's Office, March 1994.

[34] Immigration Reform and Control Act of 1986, Public Law 99-603.

percent were available for immigrants from countries that had received relatively few visas in previous years.[36]

Table 3-1 Immigration to the U.S. in 1992

Relatives of U.S. citizens and permanent residents	520,000
Skilled workers and their families.	140,000
Citizens from countries with few recent immigrant visas	40,000
Political refugees	141,000
Illegal Aliens (estimate)	200,000
TOTAL	1,041,000

Source: U.S. Immigration & Naturalization Service, 1993

Illegal Aliens

Although exact numbers were difficult to determine, research indicated that more than 200,000 illegal aliens settled permanently in the United States each year.[37] Many arrived legally as students or tourists and then stayed beyond the limitations of their visas. Others used false documents to slip past immigration officials. The majority, however, entered the country by crossing the U.S.-Mexican border, making the problem of illegal aliens, in many respects, a question of foreign policy.

Illegal aliens and border control were relatively new concepts in the history of U.S. immigration. Until 1968, there were no official limits on immigration from countries in

[35] Immigration Act of 1990, P.L. 101-649. 104 Stat. 4978. The 675.000 level was to consist of 480,000 family-sponsored, 140,000 employment-based, and 55,000 "diversity immigrants."

[36] Gimpel and Edwards, *The Congressional Politics.*

[37] Ibid.

the Western Hemisphere. There was not even an attempt to monitor the borders until 1924.[38] Mexican workers, in particular, were a critical part of the labor force in the southwest, but they generally worked in agriculture during the growing season and then returned to their homes in Mexico. From the beginning of World War II, as American recruits were sent overseas until 1964, the Bracero Program[39] gave this arrangement official status, permitting the entry of 4 million to 5 million temporary agricultural workers to fill the farm labor shortage.[40]

Since the 1960s, both the forces pushing illegal aliens northward and those attracting them to the United States had grown stronger. In 1972, the INS caught about 500,000 illegal aliens crossing the border.[41] In 1986, the year that the Immigration Reform and Control Act[42] was enacted, that figure had increased to nearly 1.8 million. The composition of the illegal alien population had changed in the previous two decades. Although the typical illegal alien was still a single young man, more women and children were entering the country illegally as well. Less than one-quarter of illegal aliens worked in agriculture. The majority lived and worked in large cities. In addition, Mexicans made up a smaller proportion of illegal aliens than in the past. Increasingly, illegal aliens were arriving from Central America, the Caribbean, and East Asia. In 1984, for example,

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[38] The Immigration Act of May 26, 1924 (43 Statutes-at-Large 153), together with the Immigration Act of 1917 (39 Statutes-at-Large 874), governed American immigration policy until 1952. At the same time, Congress established the Border Patrol in response to the concern with increased illegal movement across the borders with Canada and Mexico.

[39] In 1942 the Bracero Program (also know as the Mexican Farm Labor Supply Program) was begun in order to allow entry to agricultural workers on a temporary basis.

[40] Gimpel and Edwards. *Congressional Politics*, p. 71.

[41] Peter H. Schuck, *The Meaning of 187: Facing Up to Illegal Immigration,* The American Prospect No. 21, Spring 1995.

[42] Immigration Reform and Control Act of 1986, Public Law 99-603.

the Border Patrol in Texas arrested would-be immigrants from 43 countries.[43] The 1986 Act[44] was intended to cut off the flow of illegal aliens by penalizing employers who hired them. In fact, illegal aliens in many areas had little difficulty obtaining false documents to qualify for jobs that were readily available.

The cost of providing social services to illegal aliens was also part of the border control debate. Although nearly 3 million illegal aliens were legalized by the 1986 act, census figures indicated that 3 million to 4 million illegal aliens lived in the United States according to 1990 Census figures.[45] Like all immigrants in general, the illegal aliens were concentrated in a few states, primarily California, Texas, Florida, Illinois, and New York.

In 1982, the Supreme Court ruled that states must provide illegal aliens with schooling.[46] That decision, along with the growing proportion of women and children among the illegal alien population, added to the education and health care budgets of several states.

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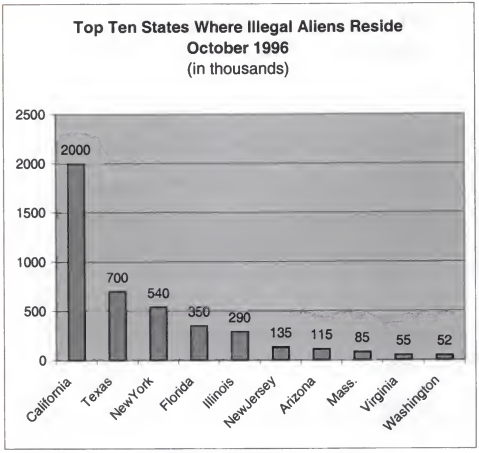
[43] Schuck, *Illegal Immigration.*

[44] Immigration Reform and Control Act of 1986, Public Law 99-603.

[45] U.S. Census, 1990.

[46] *Plyler*, 457 U.S. 220 (1982).



Source: U.S. Immigration and Naturalization Service, 1996

Figure 3-1 Top Ten States Where Illegal Aliens Reside

The same states that were burdened by the social service needs of illegal aliens, however, were also home to the businesses that employed them. Some employers contended that Americans were unwilling to work hard for low wages. Whether stitching pants in a clothing factory, washing dishes in a restaurant, or harvesting fruits and vegetables, illegal aliens had become a crucial element of the work force in many areas. Critics of the practice maintained that some employers preferred hiring undocumented workers because they were least likely to complain about low pay and poor working

conditions. In fact, law enforcement officials reported that sweatshops operating outside the law in the garment industry made a comeback in Los Angeles and New York City thanks to the availability of illegal alien labor.

The courts had long prohibited the states from discriminating against legal immigrants, largely on the grounds that the state's authority in this area was subordinate to the federal government's. But, the courts had never addressed illegal immigration. It simply had not been a major issue.

Illegal immigration first became an issue in the early 1960s. Immigration and Naturalization Service (INS) arrests—a limited indicator of illegal entries--swelled from 1.6 million during the decade of the 1960s to 8.3 million in the decade of the 1970s, and then continued to rise in the early 1980s.[47] When states and localities sought to protect their education and health care budgets by imposing restrictions on the newcomers' access to benefits, the courts could no longer ignore the issue.

Plyler v. Doe[48] stands at the apex of immigrants' rights in the United States.[49] This class-action suit brought on behalf of undocumented Mexican children living in Texas. Upholding the ruling of a lower court, a 5-4 majority canceled a statute that

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[47] Schuck, *Illegal Immigration*, pp. 85-92.

[48] *Plyler*, 457 U.S. 202 (1982). *Plyler v. Doe*[48] was a class action, filed in the United States District Court for the Eastern District of Texas in September, 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District. The Superintendent James Plyler, and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief.

[49] Michael A. Olivas, *Storytelling Out of School: Undocumented College Residency, Race, and Reaction*, Hastings Law Quarterly, Vol. 22 (Summer, 1995), 1019-1086.

withheld from local school districts any state funds for the education of any child who was not legally admitted into the United States. There the Court held that a Texas statute that effectively denied undocumented children a public-school education violated the Fourteenth Amendment's Equal Protection Clause.[50] Bearing the extra expense of providing an education and services to undocumented children was felt by Texas voters to be extremely unfair in light of the fact that these children and their parents were not supposed to be in the state in the first place.[51]

Proposition 187

Out of similar frustration over the expenses of illegal immigration to the state, the voters of California enacted Proposition 187 in 1994.[52] The statute was a dramatic effort to drive out undocumented aliens and to deter their entry by cutting them off from medical and other public services and depriving their children of an education.[53] It was described in the official ballot argument as "the first giant stride in ultimately ending the ILLEGAL ALIEN invasion." The text read as follows.

> PROPOSITION 187 (Text of Proposal)
>
> Any person who manufactures, distributes, or sells documents to conceal the true citizenship or resident alien status of another person is guilty of a felony, and shall be punished by imprisonment in the state prison for five years or by a fine of seventy-five thousand dollars.... Any person who uses false documents to conceal his or her true citizenship or resident alien status is guilty of a felony, and shall be punished by imprisonment in the state

[50] *Plyler*, 457 U.S. 202 (1982).

[51] Ibid.

[52] Proposition 187 was approved by the electorate of California on November 8, 1994, as an initiative statute. See 1994 Cal. Legis. Serv., Prop. 187 (Westlaw).

[53] Ibid.

> prison for five years or by a fine of twenty-five thousand dollars.... No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or persons who are otherwise authorized to be present in the United States.... In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care.[54]

Basically, Proposition 187 made illegal aliens ineligible for public social services, public health care services, and public school education at elementary, secondary, and post secondary levels.[55] It also created substantial criminal penalties for the manufacture, distribution, sale, or use of false citizenship or permanent residence documents. It required state and local law enforcement officials to cooperate with the INS in identifying and apprehending undocumented aliens.[56]

Proposition 187 was a combination of different policies that sought to stem the flow of illegal aliens into California. It was designed to encourage the state's roughly 1.4 million illegal residents to go home, and expel the rest. The most controversial provisions barred anyone who was not a citizen, legal permanent resident (green card holder), or legal temporary visitor from receiving public social services, health care, and education. The provisions differed slightly for each service, but they generally imposed three duties on all service providers: the verification of the immigration status of all who sought services, the prompt notification of state officials and the INS of anyone who was "determined or reasonably suspected to be" in violation of immigration laws, and the

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[54] Ibid.

[55] Schuck, *Illegal Immigration*, pp. 85-92.

notification of the alien (or in the case of children, their parent or guardian) of their apparently illegal status.[57] Proposition 187 was no ordinary law; it provided that the legislature could not amend it "except to further its purposes" and then only by a recorded super-majority vote in each house of the legislature or by another voter initiative.

California's Proposition 187 contained several components aimed at stopping illegal immigration. It strengthened federal welfare laws that already denied most benefits to illegal aliens. A provision of 187 built on existing federal law relating to the use or sale of fraudulent documents and gave the state an extra weapon to combat such activities. Proposition 187 also required local, state, and federal agencies to share information.[58]

Proposition 187 established a number of principles in relation to public education. First, it aimed to deter future illegal immigration for free education. The problem of educating illegal aliens at taxpayers' expense related not only to illegal aliens already here, but to those who would come in the future. Second, it proposed that education should be in the person's home country. Third, the initiative addressed the financial problems caused by providing illegal immigrants with free education. The costs of educating non-English speaking immigrants were higher due to their need to learn English.

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[56] Thomas A. Alienkoff, David A. Martin, and Hiroshi Motomura. (1998). *Immigration and Citizenship: Process and Policy.* Fourth Edition. West Group, St. Paul, Minn.

[57] Schuck, *Illegal Immigration*, pp. 85-92.

[58] Ibid.

The statute was attacked immediately as unconstitutional in several lawsuits, and its operation shackled by restraining orders. On Dec. 14, 1996, U.S. District Court Judge Mariana R. Pfaelzer of the Central District of California issued an oral decision to enjoin the major provisions of Proposition 187 until trial.[59]

Constitutional Violations

Based on Judge Pfaelzer's statement, the written decision/order, when issued, found that much of the statute violated two of the provisions of the Constitution -- (1) the Supremacy Clause,[60] by stepping on ground preempted by federal immigration law; and (2) the Fourteenth Amendment, first, by effectively ordering the deportation of California residents without hearings or other due process of law and, second, by denial of free education to undocumented children, that Amendment's Equal Protection clause.[61]

Proposition 187 prohibited public social services to those who could not establish their status as a U.S. citizen, a lawful permanent resident, or an "alien lawfully admitted for a temporary period of time."[62] Only persons in those categories could receive health-care services from a publicly funded health care facility, "other than emergency medical care as required by federal law."[63] Anyone else was to be denied the requested services or other benefits, directed in writing to "either obtain legal status or leave the United

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[59] "Initiative on Aliens Suffers Its Biggest Setback Yet," New York Times, Dec. 15, 1994, A18.

[60] U.S. Constitution, Article VI.

[61] Stanley Mailman, January 3, 1995. *California's Proposition 187 and Its Lessons*, New York Law Journal (p.3, col.1).

[62] Proposition 187, Sec. 5. The provisions that generate most benefits at issue are federal laws that bar aliens who are not admitted as lawful residents or otherwise permanently residing here under color of law.

[63] Ibid., Sec. 6.

States" and be reported to the authorities, including the Immigration and Naturalization Service (INS).[64]

Proposition 187 also limited attendance at public schools to U.S. citizens and to aliens lawfully admitted to the United States for permanent residence or otherwise authorized to be here.[65] Whenever school districts reasonably suspected a violation, they had only 45 days to so notify INS and other authorities and to advise parents that schooling would be cut off in 90 days.[66]

The constitutional challenge to Proposition 187 rested mainly on the *Plyler*[67] precedent. Writing for the *Plyler* majority, Justice William Brennan argued that the Texas law would inevitably harm children. These children would eventually obtain legal status in this country, yet would be "permanently locked into the lowest socioeconomic class." Brennan acknowledged that the state had some leeway in such matters. Under equal-protection principles, illegal alien status was not a "suspect class' like race or religion, and education was not a "fundamental right." Hence, it did not require heightened judicial scrutiny. Nevertheless, Brennan said, a law that denied children "the ability to live within the structure of our civic institutions . . . can hardly be considered rational unless it furthers some substantial goal of the State."[68]

Brennan conceded that keeping illegal aliens out of the state might be a legitimate state goal. But the trial court found that the Texas law had neither the purpose nor the

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[64] Mailman, *187 and Its Lessons*, p.3, col.1.

[65] Proposition 187, Sec.7.

[66] Mailman, *187 and Its Lessons*, p.3, col.1.

[67] *Plyler,* 457 U.S. 202 (1982).

[68] Schuck, *Illegal Immigration*, pp. 85-92.

effect of doing that, and Brennan agreed. The Texas law might have saved some money, according to Brennan, but Texas failed to establish that illegal aliens imposed a significant fiscal burden on state coffers or that their exclusion would improve the quality of education. In addition, Brennan said, federal immigration policy was not concerned with conserving state educational resources, much less with denying an education "to a child enjoying an inchoate federal permission to remain."[69] (This referred to the possibility that an illegal alien might obtain discretionary relief from deportation.) All the Texas law would serve to do, Brennan said, was to promote "the creation and perpetuation of a subclass of illiterates,"[70] who would be socially dysfunctional and a burden to society. That, he said, clearly was not something the states were allowed to do.

The parallels from *Plyler* to Proposition 187 were obvious. Both would in effect bar undocumented children from the public schools; if anything, California's new ban on enrolling such children was even more categorical and rigid than the Texas statute invalidated in *Plyler*. Any court that accepted Brennan's premises in *Plyler* would have had difficulty sustaining Proposition 187.[71]

If aliens remained in the United States, paid taxes and became part of the community, their misfortunes had to be dealt with, for their sake and that of society. A lesson from *Plyler* was that children could not be punished for evasion of immigration laws, and, if they were allowed to remain here, they would be educated (and otherwise cared for) in the general community interest. A second lesson was that aliens came to

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[69] Ibid.

[70] Ibid.

[71] Ibid.

the United States primarily to work—not for schools or medical care or other public benefits.[72]

Conflict with Federal Laws

The 5-4 opinion in *Plyler* brought out two conflicting themes, variations of which appeared in the Proposition 187 litigation. First, the undocumented status of aliens might itself have been sufficient basis for denying governmental benefits that it provided to others. However, control of immigration was within the exclusive purview of the federal government. While "the States did have some authority to act with respect to illegal aliens, at least where such action mirrored federal objectives and furthered a legitimate state goal," the disability imposed on the students did not correspond with "any identifiable congressional policy," and, more important, the classification of undocumented students "did not operate harmoniously within the federal program."[73]

The compelling consideration for the *Plyler* Court was how the statute hurt innocent children and society. These considerations were conclusive: "Illiteracy was an enduring disability. The inability to read and write would handicap the individual deprived of a basic education each and every day of his life. In determining the rationality of [the statute], one must appropriately take into account its costs to the Nation and to the innocent children who are its victims."[74]

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[72] Mailman, *187 and Its Lessons*, p.3, col.1.

[73] 457 U.S. at 225-26, citing *De Canas v. Bica*, 424 U.S. 351 (1976), as cited in Mailman, *187 and Its Lessons*, p.3, col.1.

[74] 457 U.S. at 222, 223-24. Constrained by its earlier holding in *San Antonio School District v Rodriguez*, 411 U.S. 1 (1973), that education is not a "fundamental right," and given its opinion that undocumented status is not a "constitutional irrelevancy," the Court applied an intermediate rather than strict scrutiny test.

How did *Plyler* control the constitutionality of Proposition 187? From Judge Pfaelzer's verbal decision, *Plyler* directly affected only those who sought to enter or remain in elementary or secondary schools; those in the university system would not be protected.[75] However, elements of *Plyler* were brought into a more general constitutional attack on Proposition 187, relating to the supremacy of federal legislation over the subject of immigration. Congress unquestionably had authority to legislate on immigration and had exercised that power comprehensively in "regulating authorized entry, length of stay, residence status, and deportation," and in the treatment of aliens otherwise.[76] In defining who received benefits, Congress had positioned immigration classifications into the framework of various public assistance programs.[77]

Additionally, under Proposition 187, frontline, untrained state employees decided who "had apparent illegal status" or was here "in violation of law" and therefore ineligible for benefits.[78] Those who conveyed the bad news were deputized to direct the applicant to leave the country, effectively to issue what could have easily been taken as a deportation order. Yet, the Immigration and Nationality Act provided that such an order could be issued only by an immigration judge after a hearing on a record, with the government bearing the burden of proof, and the alien having a right to counsel.[79] Furthermore, PRUCOL (permanent resident) aliens by definition had INS permission to

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[75] 457 U.S. at 219.

[76] *Gonzales v. City of Peoria*, 722 F2d 468, 474-75 (9th Cir. 1983).

[77] Janet M. Calvo, "Alien Status Restrictions on Eligibility for Federally Funded Assistance Programs," 16 New York University Review of Law & Social Change, 395 (1987-88).

[78] Proposition 187, Sec. 5-7.

[79] INA Sec. Sec. 242(b), 292, 8 USC Sec.Sec. 1252(b), 1362.

stay in the United States; and many aliens, although deportable, could have been granted discretionary relief that allowed them to remain.[80] Here, too, the California statute conflicted with federal legislation.[81]

Due Process

Plaintiffs also argued that Proposition 187's procedure violated the Fourteenth Amendment's Due Process clause by threatening to take away valuable rights or interests without a prior hearing. Public assistance, for example, was an interest that could not be cut off without a pre-termination hearing.[82] Due process also required a hearing before a deportation order could be entered.[83] Proposition 187 therefore violated the Constitution when it instructed state employees to terminate a woman's pre-natal care or turn a child out of school and then directed the parties to leave the United States -- without a hearing or other means of evaluating their rights.[84]

The same equal protection, supremacy and due process provisions that controlled Proposition 187, challenged other states as they considered what to do about undocumented aliens. And a state law must also have passed muster under its own constitution. For example, a provision of New York's constitution that mandated support of the needy, "unequivocally prevents the Legislature from simply refusing to aid those

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[80] See, e.g., INA Sec.Sec.208, 243(h), 24, 245, USC Sec.Sec.1158, 1252(h).

[81] Mailman, *187 and Its Lessons*, p.3, col.1.

[82] *Goldberg v. Kelly*, 397 U.S. 254 (1970).

[83] *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), modified, 339 U.S. 908.

[84] Mailman, *187 and Its Lessons*, p.3, col.1.

whom it has classified as needy."[85] Under California's own equal protection provision, education was treated as a matter of "fundamental interest" whose "unique importance . . . in California's constitutional scheme required careful scrutiny of state interference with basic educational rights."[86] That was why some California plaintiffs attacked Proposition 187 in their state court, urging the *Plyler* analysis.[87]

Proposition 187, like the "Official English" laws approved in California and elsewhere since the mid-1980s, was a symbolic message to policy elites. These measures were grand gestures with few practical consequences other than to convince politicians that many voters viewed American society as increasingly alien (literally) and uncontrollable. Voters responded angrily to the vivid television images of Mexican officials denouncing the measure and to the marchers in Los Angeles waving Mexican flags and protesting its limits on welfare benefits. On election day, the voters indicated that illegal immigrants, industrious as they were, were part of the problem and that Proposition 187, crude as it was, was part of the solution. It was no solution, of course, but that only underscored the need for a sounder political response in order to forestall future initiatives of this kind.

The U.S. Congress was far less constrained than the states in the classification of aliens, having a preeminent role in their regulation.[88] As the Supreme Court has said, "Over no conceivable subject is the legislative power of Congress more complete."[89]

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[85] See New York Constitution, Article XVII; *Tucker v. Toia*, 43 NY2d 1, 8 (1977).

[86] See California Constitution, Article I, Sec.7(a). See also *Serrano v. Priest*, 18 Cal3d 728, 767-68 (1976).

[87] Mailman, *187 and Its Lessons*, p.3, col.1.

[88] See *Toll v. Moreno*, 458 U.S. I, 10 (1982).

[89] See *Mathews v. Diaz*, 426 U.S. 67 (1976).

It made little sense for Congress to legislate in the areas of immigration and public assistance without reviewing the precedent immigration laws and policies under which the affected aliens were here; and the reduction in federal programs was no saving if it simply shifted their costs to the states and communities where the aliens and their families lived.[90]

Immigration And Education

Many states, particularly those with the highest percentages of illegal immigrants were concerned over the expenses they incurred by providing public social services and educational benefits to illegal immigrants. Only the federal government could enact immigration policy,[91] to which states must adhere. Some state challenges to federal immigration policy focused considerable public interest on the immigration issue, both legal and illegal, and the lack of adequate funding to carry out the required mandates of the policies.

Because the federal courts made immigration legislation, the states had the obligation to follow the mandates. Little if any funding followed policy, often leaving the states with the largest numbers of legal as well as illegal immigrants, with more than their share of the overwhelming costs of educating the children.

In the wave of anti-immigrant sentiment, other states had made proposals to bar undocumented immigrant students from attending public schools, counter to federal efforts to keep students in school rather than out. Virginia, for instance, required its

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[90] See *Plyler v. Doe*, 457 U.S. 202, 225 (1982). Cf. *DeCanas v. Bica*, 424 U.S. 351(1976).

[91] Ibid.

schools to verify the legal status of all students over 18 years of age enrolled in English as a Second Language programs, and of all students over 20 who entered the U.S. after the age of 12, or risk losing some state funding.[92]

An initiative similar to Proposition 187 was proposed by Rep. Elton Gallegly[93] as an amendment to the omnibus immigration reform bill (H.R. 2202) in 1996. The amendment attempted to combine two entirely different issues into one bill. Joining efforts to secure our borders with reforms to our system of legal immigration served only to confuse the debate.[94] It played on the public's understandable concern over illegal immigration but twisted that concern into the misguided notion that all immigration was harmful and all immigrants were undocumented, sneaking into our country by night. Neither notion, of course, was true, but dealing with illegal and legal immigration in one bill served to fuel hostility and even prejudice toward all immigrants. The amendment would have authorized states to deny public education to the children of illegal aliens. It would have denied American citizens and legal permanent residents the opportunity to bring close relatives into the United States. H.R. 2202 would also have increased the income a family needed to bring a family member up to a level that denied 40 percent of Americans the chance to reunite with loved ones.[95] The provision was passed by the full House of Representatives but was eliminated by the conference committee--because no vote had been taken in the Senate on this issue. But the measure was again passed as a

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[92] Ibid.

[93] Charles Levendosky, "The Politics of Turning Children into Victims," *Casper (Wyo.) Star Tribune*, May 1996.

[94] Gimpel and Edwards, *Immigration Reform.*

[95] Serrano, House of Representatives, <thomas.loc.gov/cgi-bin/query/D?r104:3./temp>.

separate bill in the House.[96] One version of the proposal would have denied public education to children who were illegal aliens themselves, rather than all children of illegal aliens (which would have included some U.S. born, citizen children). The bill failed to address the fact that employment was the primary reason immigrants, whether legal or illegal, came to this country.[97]

Supporters of the Gallegly Amendment argued that America's education system, like other social-service programs, attracted a disproportionate number of immigrants and that the cost of educating such children was too high in an era of tight school budgets. Opponents of the measure denounced it as cruel; hundreds of thousands of children would potentially be turned away at the schoolhouse door.[98]

A portion of the Gallegly amendment read:

> "Congress declares it to be the policy of the United States that ... aliens who are not lawfully present in the United States not be entitled to public education benefits in the same manner as United States citizens and lawful; resident aliens . . ."[99]

The House bill allowed states to make their own determination about whether the public schools would be open to children of illegal immigrants. The amendment did not provide for Immigration and Naturalization Service officials to enter schools and it did not provide funds for schools to hire people. The public schools have traditionally

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[96] Charles Levendosky, "The Politics of Turning Children into Victims," *Casper (Wyo.) Star Tribune*, May 1996.

[97] Gimpel, James G. and Edwards, James R. Jr., 1999. *The Congressional Politics of Immigration Reform*, Needham Heights, MA, Allyn & Bacon.

[98] "Illegal Immigrant Children: In or Out of Public Schools?" *Education Week*, April 1996. <www.edweek.org/context/election/immig.htm.>.

[99] Gallegly Amendment, H. R. (2022), 1996.

educated all the children who came through their doors. The Gallegly provision would have turned teachers and school administrators into substitute INS officers.[100]

Adding a new dimension to the issue was the North American Free Trade Agreement (NAFTA)[101] that had been negotiated by the United States, Mexico, and Canada. The agreement created a regional trading bloc of 370 million people by lowering trade barriers among the three countries. The agreement was designed to reduce the flow of illegal aliens by creating better-paying jobs in Mexico. Even though the trade agreement was approved, some experts on illegal immigration argued that the United States needed to focus greater attention on developing the economies of Mexico and its neighbors to keep potential illegal aliens at home. They maintained that increased foreign aid to the countries of Latin America and incentives for low-wage American industries to invest in the region were necessary to generate more local jobs. A hope of this measure was the elimination of the need for further legislation on the illegal immigrant issue.

American society had changed, and part of the "difference" sustained those Americans still confident about our assimilative capacity--some of which mistakenly assumed that mass immigration was a constant historical fixture of American society

As the influx of immigrants continued and the number of immigrant children enrolled in the public education system grew, school systems expanded along with them. Statistics showed that, in spite of the many obstacles immigrant children overcame as new students in a new country, they persevered and some did as well if not better than

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[100] Charles Levendosky, "The Politics of Turning Children into Victims," *Casper (Wyo.) Star Tribune*, May 1996

[101] *North American Free Trade Agreement*, August 1992.

U.S. natives. As they completed their public education, many chose to pursue their education further and enrolled in colleges and universities. Although immigrants were less likely to have graduated from high school, they were more likely to graduate from college when compared to the U.S. native population.[102]

Justice Brennan[103] used the inherent difficulty of immigration control as a justification for making it even more intractable. He assumed that exclusion from the schools was a wholly ineffective way to influence immigrants' behavior, yet it was surely true that at least some parents were less likely to immigrate if they knew their children would be denied schooling. Illegal aliens always had alternatives. They could return home or refrain from coming in the first place. These options seemed harsh but they followed directly from the premise of national territorial sovereignty, a premise that the Court had always affirmed.[104]

While the federal government moved to curb illegal migrants, it never cut off many of their benefits, notably including public education in federally assisted schools and emergency Medicaid services. The courts could have taken this inaction to mean that Congress remained satisfied with *Plyler* and did not wish to undermine the decision's rationale.[105]

Political leaders needed to recognize that illegal immigration was not an unmitigated evil and that immigration enforcement competed for resources with other

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[102] Schuck, *Illegal Immigration*, pp. 85-92.

[103] Ibid.

[104] Ibid.

[105] Ibid.

social goals. Although it was hard to admit that the U.S. tolerated some lawbreakers as a matter of policy, the fact was that it did--and always would. The U.S. was a large country with relatively low population densities even in the cities, and with a vast economy that needed more unskilled labor than U.S. nationals were willing to supply at existing wage levels. It continued to assimilate a significant number of illegal aliens so long as the costs were not too high or too localized. [106]

If the enforcement policy "allowed" illegal aliens to enter and remain long-term (but illegal) residents, then Brennan was surely right: there was little point, and even less justice, in consigning them to lives of ignorance, dependency, and discrimination by denying them education--a denial that would injure not only them but the American communities in which they would live and work. For much the same reason, they were permitted to receive emergency medical care. [107]

But misguided as such measures as Proposition 187 and the Gallegly Amendment were, they did have the effect of forcing us to consider anew what it meant for the U.S. to be a nation of immigrants at a time when the core values of legality, national sovereignty, and self-reliance were under extraordinary pressures from within and without.

Since immigration policy, both legal and illegal, was the duty of the federal government, it was unfair to make states like Texas, California, and Florida, which bore the burden of most illegal immigrants, pay for the government's federally mandated services. Because of the government's inability to control effectively the flow of illegal

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[106] Ibid.

[107] Ibid.

immigrants crossing the border, it should have reimbursed these states for the expenses incurred in providing services to illegal aliens.

Justice Department lawyers indicated that the government spent more than $1 billion a year on immigration enforcement and returned more than one million immigrants to their homelands. The lawyers pointed to those actions as demonstrations that there had been no abdication of federal responsibility.[108] Reimbursing the states was only a small portion of what the federal government could have done to relieve the burden that the social and educational needs of illegal immigrants have put on this nation.[109]

Florida Immigration and Education

Due to Florida's geographical position, it attracted a disproportionate number of legal as well as illegal immigrants. Florida was the state with the fourth largest illegal immigrant population, behind California, New York and Texas, in 1997.[110] This growth in numbers resulted in an increased demand for state services such as emergency health care, education and incarceration, and in turn, increased the state expenditures for providing these services.[111]

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[108] Ibid.

[109] Ibid.

[110] Joyce C. Vialet and Larry M. Eig, *Immigration and Federal Assistance: Issues and Legislation,* Congressional Research Service Issue Brief, April 18, 1996.

[111] Ibid.

Florida sued the federal government in 1994, saying it had failed to protect the state from a "massive and uncontrolled influx of aliens" and had coerced the state into paying the cost of national immigration policy.[112]

Florida lost the Supreme Court appeal intended to improve federal enforcement of immigration laws or repay the state's cost of providing social services and education to illegal aliens. The court, without comment, refused to revive the state's claim that the federal government had violated its duty to police the nation's borders.[113]

Florida maintained that the federal government had a "policy of accommodating illegal immigration" that cost the state hundreds of millions of dollars in extra expenses each year for education, medical care, and law enforcement. State officials estimated that Florida had spent $1.5 billion on undocumented aliens while the federal government collected almost $3.4 billion a year in taxes from such aliens. The state sued the federal government in 1994, saying it had failed to protect Florida from a "massive and uncontrolled influx of aliens" and coerced the state into paying the cost of national immigration policy. [114]

The lawsuit claimed the government had violated immigration law and the Constitution's 10th Amendment, which reserved certain powers to the states. The lawsuit also cited the Constitution's promise that the federal government would protect states against invasions.[115]

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[112] Laurie Asseo, *Florida Won't Be Compensated For Illegal Immigration,* May 96, <www.usatoday.com/news/court>.

[113] Ibid.

[114] Ibid.

[115] *Florida Won't Be Compensated For Illegal Immigration.* 5/28/96 <www.usatoday.com/news/court>.

A federal judge disposed of the lawsuit, and the 11th U.S. Circuit Court of Appeals upheld the dismissal.[116] The appeals court ruled that Federal immigration law allowed the attorney general to decide how it was enforced, adding that Florida's other claims were political questions that could not be decided by courts.[117]

In the appeal, Florida Attorney General Robert A. Butterworth said, "If the national government chose to enforce the immigration laws, Florida's expenditures for education and law enforcement on behalf of its alien population would not be necessary."[118] (Five other states -- New York, California, Arizona, Texas and New Jersey -- have had similar lawsuits thrown out by federal judges.)

As the number of foreign-born and limited English proficient (LEP) students grew in Florida, so did the number of issues and concerns about the entry of these students to public schools. In a technical assistance paper dated June 23, 1995, from the Deputy Commissioner for Education Programs, policies and procedures for student admittance were outlined for local school districts. The assistance paper addressed homeless children, in that they would be admitted to school in the district in which they resided. School districts would assist homeless children to meet the requirements for school entry.[119] It also emphasized that districts could not require "any evidence of United States citizenship for enrollment."[120] No district could classify students as non-residents

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[116] Ibid.

[117] Ibid.

[118] Chiles vs. U.S., 95-1249.

[119] *Consent Decree,* [s. 232.01 (1)(f), FS], Compulsory School Attendance.

[120] Ibid.

based upon their immigration status and no district could inquire into a student or parents' immigration status.[121]

In spite of the rapid growth in the numbers of non-English language background students beginning with the decade of the 1960s, it was not until 1990, that policies were established with regard to Limited English Proficient (LEP) student access to educational opportunities. Rather than face potentially protracted, costly litigation resulting from a class action suit on behalf of non-English language background students, the state entered into a Consent Decree[122] to ensure equitable educational opportunities for Florida's LEP public schools. The Consent Decree put school districts on notice that policies and practices had to be changed. According to the Decree, LEPs were to be provided meaningful instruction to ensure English-language literacy and academic achievement.[123]

The Consent Decree was implemented in 1991, and although there were no major international events to create high levels of immigration, two years later, in 1993, the number of LEPs identified statewide nearly doubled.[124] The number of LEPs continued to grow as the identification process became more systematic. As a result of the increased attention to assessment procedures, almost all of Florida's 67 districts had increased numbers of identified English language deficient students.[125]

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[121] *Consent Decree,* [s. 228.121,FS]. Nonresident Tuition Fee.

[122] *League of United Latin American Citizens* (LULAC) *et al. v. the State Board of Education et al. Consent Decree,* U.S. District Court for the Southern District of Florida, August 14, 1990.

[123] Sandra H Fradd and Okhee Lee (1998). *Creating Florida's Multilingual Global Workforce.* Tallahassee, FL: Florida Department of Education.

[124] Florida Management Education Services. (1994). *Current year student data by district.* Tallahassee, FL: Florida Department of Education.

[125] Florida Department of Education. (1996a). *1994-95 annual status report on the implementation of the 1990 League of United Latin American Citizens (LULAC) et al v. State Board of Education Consent Decree.* Tallahassee, FL: Office of Multicultural Student Language Education.

Florida School Laws:

> Regular school attendance required between ages of 6 and 16; permitted at age of 5; exceptions. —
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> (1)(a) All children who have attained the age of 6 years or who will have attained the age of 6 years by February 1 of any school year or who are older than 6 years of age but who have not attained the age of 16 years, except as hereinafter provided, are required to attend school regularly during the entire school term. (f) Homeless children, as defined in s. 228.041, must have access to a free public education and must be admitted to school in the school district in which they and their families live. School districts shall assist homeless children to meet the requirements of §. 232.03, 232.03115, and 232.032, as well as local requirements for documentation.[126]

Districts were prohibited from requiring evidence of United States citizenship for enrollment. School personnel enrolled students in school even though they may not have entered the United States legally. In accordance with law (*Plyler v. Doe*, 1982 U.S. Supreme Court), any student who lived in any state, and was of compulsory school age was entitled to equal access to public school. The student needed only to produce evidence of residence in the attendance zone of the school district.[127] Pupils in grades K-12 whose parents or guardians were non-residents of Florida could be charged a tuition fee of $50.00 payable at time of enrollment. A non-resident was classified as someone who had lived in Florida less than a year, had not purchased a home which was occupied as a residence and had not filed a manifestation of domicile in the county. No tuition was

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[126] Florida School Laws, Chapters 228-246, 1999.

[127] June 23, 1995, Memorandum, "Enrollment of foreign-born and LEP students" Florida DOE.

charged to pupils who were homeless, pupils whose parents were in the military, worked for the military or to migrant children, or who resided in HRS residential facilities.[128]

Districts could not request proof of immigration status such as alien registration number, tourist visa, passport, etc. In order to fulfill its requirement for eligibility for federal funds such as the Emergency Immigrant Education Act or the Refugee/Entrant Targeted Assistance Program,[129] the only information that could be required from foreign-born students was their country of birth, and their date of entry into the United States. However, school enrollment could not be delayed pending this information.[130]

School districts had to ensure that refugees and foreign-born children were provided free, equal and unhindered access to appropriate public education. No copies of any immigration documentation could be elicited or maintained as part of a student's records.[131]

In Florida, the 345,000 illegal immigrants estimated to be in the state in 1992 cost $913 million more than their tax contributions.[132] Public education, including bilingual, adult and compensatory education in 1992 was 22.8 percent of all direct outlays for immigrants. Local government services, including indigent medical care, mental health, and family and child welfare services, accounted for 20 percent of immigrant costs.[133] Social Security outlays were put at 20.2 percent. The three foregoing programs, together

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[128] *Consent Decree* [s. 228.121 (1)-(4), FS], Non-resident Tuition Fee.

[129] *The Emergency Immigrant Education Act* (EIEA), Title IV, part D of the Elementary and Secondary Education Act, as amended, (20 U.S.C. 3121-3130).

[130] *Consent Decree* [s. 228.121,FS], Non-resident Tuition Fee

[131] Ibid.

[132] *What does immigration cost Florida each year?,* < www.carryingcapacity.org/HuddleFlorida.htm.>.

with Medicaid (10.2 percent) and criminal justice/corrections (5.4 percent) accounted for over 75 percent of total direct outlays for immigrants in Florida at that time.[134]

Researchers for The Urban Institute estimated the 1996 Florida's non-citizen population at 1,431,000[135] (10 percent of state's population), which ranked fourth behind California, New York and Texas in numbers. Of that number, 350,000 were estimated to be illegal immigrants.[136] It is important to note that estimating the size of a hidden population was inherently difficult. While estimates were based on the most reliable information available, no allowances for students or other long-term non-immigrants were made.

Because Florida was one of the major entry ways for newly arrived non-English language background students and families, its public schools faced challenges not experienced by many other states. These challenges were seen as the vanguard for the future of public schools across the nation. As Florida effectively addressed its challenges, it was not only increasing the educational level of its work force, but also providing important benchmarks for other states with growing numbers of LEPs. For most of the decade of the 1990s, Florida school districts were highly impacted by the presence of LEPs and the policies to provide them with an appropriate education. Although, districts responded to the requirements of the Consent Decree, LEPs were often viewed as presenting unique challenges, rather than bringing assets to be valued.

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[133] Ibid.

[134] Ibid.

[135] Karen C. Tumlin, Wendy Zimmermann, and Jason Ost, *State Snapshots of Public Benefits for Immigrants: A Supplemental Report to "Patchwork Policies."* The Urban Institute, Washington, DC, (1999).

[136] *Illegal Alien Resident Population*, Census Bureau, 1996.

As a result, the potential strengths and opportunities these students represented sometimes went unrecognized.[137]

Florida faced three different types of challenges in educating LEPs: (a) the need for effective personnel to fully implement educational policies; (b) a commitment to equity in achieving academic excellence; and (c) leadership in creating a unified vision of educational outcomes. With increased international trade and an expanding global market, the presence of LEPs continued to grow statewide. It was necessary to find a way to recognize the opportunities and challenges of educating the LEP students, and to promote educational reform to the many areas of the state's development.[138]

Summary

The earliest immigration laws were to protect the populace from indigents and other undesirables. Immigration laws then designated who and how many people could be admitted from any given country. Subsequently, the immigration laws allowed relatives of immigrants already in the country to emigrate in an effort to keep families together. Once they started coming, the immigration laws turned to immigrant policy to provide the necessary services, including health care, to these immigrants who had arrived in the U.S. with almost nothing. The cost of providing social service benefits to illegal immigrants fell to the states and was part of the border control debate. In addition, in 1982, the Supreme Court[139] ruled that states must provide illegal immigrants with schooling. That decision added to the education and health care budgets of several states.

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[137] Fradd and Lee, *Creating Florida's Multilingual Global Workforce.*

[138] Ibid.

From there, the issue became the unfairness that certain states with exceptionally large immigrant populations had to carry so much of the financial burden of providing those services.[140] School systems in these states became fiscally strained. To eliminate these overburdened costs, legislation was introduced to deny social service and health care benefits, and especially educational benefits to illegal immigrants.[141] Although the legislation was defeated, it succeeded in bringing to the forefront the issue of enforcing borders and immigration laws.

Considering the history of the litigation on behalf of and against the illegal immigrant student, the educational mandates that resulted from the litigation, remained, and children of illegal immigrants faired better in school with each passing generation. The teachers were better prepared, the materials were more relevant and there were more bi-lingual students to assist the newest immigrant student with the transition from language to language and from culture to culture. Florida's dilemma then, with the rising numbers of immigrants and the minor support it received in services and funding from the federal government, was how to continue to provide the needed services, including education, to these immigrant children and their families.

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[139] *Plyler,* 457 US 202 (1982).

[140] Proposition 187.

[141] Ibid.

CHAPTER 4
FINANCIAL AND ETHICAL ISSUES

Introduction

There were many fiscally obligatory issues relating to legal and illegal immigrant education, the more important being English language proficiency and program equity. Federal legislation and policy played an enormous role in setting up programs and services as they were and in requiring the states to be responsible for implementation. In addition, there were moral and ethical issues to be considered in the course of providing educational services for the immigrant student population.

Legal Basis For States Responsibilities

Public education had always played a major role in shaping American society. The public schools had often assumed the roles of both agents and enforcers of political, economic, and social concerns.

Education was a plenary power granted to each state. Congress delegated authority to the state to 'establish and maintain a system of free public schools wherein all the children of the state may be educated'. Educational practices, even though a state function, conformed to the principles of the Fourteenth Amendment. In all fifty state constitutions, the legislature was given the responsibility to determine policy. The state,

therefore, retained discretionary power over the collection, method and distribution of educational funds. It delegated to local school districts to act on its behalf.[1]

Politicians, states' attorneys general, and scholars have debated at length the very sovereignty of federal law in its provision for public education to illegal residents. The issue raised states' rights and federalism questions, concerns about the economic impact of large school-age immigrant populations, and constitutional questions about the separation of powers. Conservatives and strict constitutionalists had long decried the encroachment of the federal judiciary on political questions, most of which, they argued, rightly should be resolved at the state and local levels. Of particular relevance to immigration policy was the 1982 Supreme Court decision in *Plyler v. Doe*.[2] The Court ruled that states could not deny public schooling to illegal immigrants.

Another Supreme Court decision with implications for the education of immigrant children was *Lau v. Nichols*, rendered in 1974.[3] This case focused on the rights of non-English speaking children and corresponding duties of public schools to address their unique needs. Specifically, Chinese students asserted that the San Francisco public school program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964[4] by failing to make adequate provisions for the needs of students with English language deficiencies. The Court held that the lack of sufficient remedial English instruction violated Title VI, which prohibited discrimination

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[1] Cynthia McDaniels, *Equality of Educational Opportunity: Race and Finance in Public Education*, The Constitution, Courts and Public Schools, Vol.1, 1992, Yale-New Haven Teachers Institute, Conn.

[2] *Plyler v. Doe*, 457 U.S.202 (1982).

[3] *Lau v. Nichols*, 414 U.S. 563 (1974).

[4] 42 U.S.C. § 2000(d).

on the basis of race, color, or national origin in institutions with federally assisted programs. The Court held that giving students the same textbooks, teachers, and curriculum did not provide equal opportunities. Further, requiring children to acquire English skills on their own before they could hope to make any progress in school made "a mockery of public education."[5] Emphasizing that "basic English skills were at the very core of what these public schools teach," the Court concluded "students who did not understand English were effectively foreclosed from any meaningful education."[6]

In a number of subsequent cases, the courts consistently ruled that English-deficient students were entitled to special assistance in public schools. The federal Equal Educational Opportunities Act (EEOA) of 1974[7] provided that no state could deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin.[8] It additionally required each public school system to develop appropriate programs "to overcome language barriers that impeded equal participation by its students in its instructional program."[9] While EEOA stipulated that school districts must provide appropriate assistance for students with English deficiencies, it did not require that such assistance be in the form of bilingual/bicultural education. Based on these decisions, school districts could satisfy legal requirements by providing remedial English instruction rather than bilingual programs.

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[5] *Lau v. Nichols,* 414 U.S., p. 566.

[6] Ibid.

[7] Equal Education Opportunities Act of 1974 (EEOA) at 20 U.S.C. 1703.

[8] 20 U.S. C. § 1703(f).

[9] Ibid.

On August 14, 1990, a Consent Decree[10] was signed in United States District Court on behalf of the Florida State Board of Education and of the plaintiffs who had alleged that the State Board of Education had not complied with its obligations under federal and state law to ensure that the Florida school districts provided equal and comprehensible instruction to Limited English Proficient (LEP) students.

The Consent Decree, variously known as English for Speakers of Other Languages (ESOL) Agreement, the Department of Education (DOE), Multicultural Education Training Advocacy, Inc. (META) Agreement, and the Doe-META Consent Decree, [11] governed the education of LEP students in the state of Florida, in grades Pre-K to 12. It was incorporated into Florida Statutes (233.058) and Florida State Board of Education Rules (6A-6.900 – 6A-6.909). The viability of the decree did not depend on its being sanctioned by state statute and rule.[12] The agreement was also significant because it prevented the state from requesting specific information relative to immigration status (except for information relative to the Emergency Immigrant Education Program and refugee education programs). Beginning with the 1990-91 fiscal year, all students were surveyed on their English proficiency, and new students were surveyed in subsequent years. Students classified as Limited English Proficient (LEP) became eligible for appropriate classroom instruction.[13]

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[10] *League of United Latin American Citizens* (LULAC) *et al. v. the State Board of Education et al. Consent Decree,* U.S. District Court for the Southern District of Florida, August 14, 1990.

[11] Ibid.

[12] "The Unfair Burden," *Immigration's Impact on Florida,* Florida Governor's Office, Tallahassee, Fl., March 1994.

[13] Ibid.

Federal statutes and case law required school districts to take appropriate action to overcome language barriers that impeded student achievement. The specific action was left to the discretion of the school district so long as it was based on: 1) a sound educational theory; 2) sufficient resources implemented to enact the theory; and 3) if after a period of time students were not making progress, a different approach was provided to the students. The federal laws required staff members to have training and experience in English language acquisition skills; it also required that assessment programs be meaningful and validated. Financial responsibility for funding the federal mandates remained with the state of Florida. Each district decided how it would deal with meeting immigrant student educational needs within its confines.

Education Finance

In 1823, Congress resolved that the Ways and Means Committee inquire into the expediency of appropriating and setting apart a portion of the avails of the annual sales of the public lands for the purpose of establishing a permanent increasing fund, the interest of which, . . . shall be distributed for the promotion of education in the several States, according to the principals of equal right and justice.[14]

From this minimal beginning, some difficult issues involving finance arose through time as educational institutions and agencies attempted to provide services to immigrants. How should the funds needed to cover the added costs of educating immigrants be generated? Should immigrant education programs be separately authorized from comparable programs serving the native-born student? Do immigrants

[14] Annals of Congress, House of Representatives, 17th Congress, 2nd session, U.S. Congressional Documents and Debates, 1774-1873, pp. 959-960.

"pay their way" by contributing in taxes an amount sufficient to meet their additional educational costs? These basic issues were debated at national and local levels, but such discussion was not always enlightened to the extent possible by knowledge of how much immigrant education actually costs or of the values that are at stake; nor were the issues always stated clearly.[15]

The Emergency Immigrant Education Program[16] and the META agreement[17] covered the required needs and responsibilities for serving all immigrant children. Also considered were the immigrant parents, and immigrant public interest groups' advice, thoughts and opinions. The most helpful, cost efficient, and productive initiatives needed to be implemented and, in some cases, developed to serve the undocumented immigrant in their adopted society.

The equal protection question emerged because of the variation in local school districts' educational expenditures. The level of school expenditure in a district was mainly determined by the wealth of the local tax base, i.e. taxation of real property. In some districts, property included large estates and broad industrial holdings that generated large amounts of tax revenue. In contrast, districts without industries or high-income property did not have a strong tax base, which limited the amount of money available for education.[18]

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[15] David W. Stewart, (1993), *Immigration and Education: The Crisis and the Opportunities,* Lexington Books, New York.

[16] *The Emergency Immigrant Education Act* (EIEA), Title IV, part D of the Elementary and Secondary Education Act, as amended, (20 U.S.C. 3121-3130).

[17] *League of United Latin American Citizens* (LULAC) *et al. v. the State Board of Education et al. Consent Decree,* U.S. District Court for the Southern District of Florida, August 14, 1990.

[18] Ibid.

The *Serrano v. Priest*[19] case illustrated district disparities. John Serrano's two children lived in and attended school in a poor Mexican-American community in Los Angeles. He wanted quality education for his children and felt that they were denied equal protection because of their lack of wealth. The California Supreme Court agreed with the plaintiff's contention in the *Serrano* case.

> "We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors."[20]

In 1954, the Supreme Court's landmark decision in *Brown v. Board of Education*[21] set equality of educational opportunity.

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . .. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[22]

Education finance theorists claimed that this passage basically meant that where the government had undertaken to provide education, it did so on an equal basis for all the residents of a given state. *Brown v. Board of Education*[23] marked the modern era of education finance theorists using the courts as the vehicle to shape education finance

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[19] *Serrano v. Priest.* California Supreme Court, 1971.

[20] Ibid.

[21] *Brown V. Board of Education,* 347 U.S. 483, 74 S. Ct.686, (1954).

[22] Ibid., pp. 492-293.

[23] James W. Guthrie, *School Finance Policies and Practices the 1980s: A Decade of Conflict,* (1988).

change. Social equity in education would become part of the consciousness of the American public from this point forward.[24]

The debate in California over providing public education to children of undocumented immigrants centered on the "$2-billion subsidy" endured by California tax payers. Those who quoted this expense assumed that it was the true cost of educating these children and would be the net savings to the public education system from barring illegal immigrants.[25]

The basis for the $2-billion (California) estimate came from the projections by the Immigration and Naturalization Service and Census Bureau. Using these data, a common estimate for the number was then multiplied by the per pupil average costs, which for large urban school districts have ranged between $6,000 and $7,000 a year in 1996.[26]

The problem with this estimate, however, was not the number of undocumented children enrolled in public schools, but the use of average cost data rather than marginal cost data, the additional costs of educating the undocumented students. This was considered by some to be a major methodological flaw. Average costs included fixed costs such as buildings, debt payment on bonds and, in some instances, multiyear negotiated contracts for salaried employees and variable costs such as classroom materials and supplies. In the case of K-12 education, there was a considerable amount of fixed cost hidden in the average cost estimate and a limited amount of variable cost. Therefore, eliminating access to K-12 education to undocumented students would not

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[24] *Lau v. Nichols,* 414 U.S. p. 566.

[25] Adela de la Torre, *False Figure Fuels Furor,* Los Angeles Times, July 31, 1996, Section B.

[26] Ibid.

result in anything near a $2-billion cost savings. The fixed costs of these school districts remained. So the closings and teacher layoffs required to save this amount of money could not happen, because these fixed costs were required to meet the needs of the remaining students.[27]

As for the incremental impact of immigrant students, researchers began to sort out some of the additional costs to targeted programs like bilingual education. A study by the Urban Institute suggested that the incremental cost to the core curriculum for bilingual education was only $1,000 per student. Using this approach drastically reduced the cost estimate for educating immigrant students from $2 billion to $300 million or less.[28]

In Seminole County, Florida, for instance, the LEP student carried a weight of 1.211 of the per student basic weighting of 1.0, which equated to $3193.00 per year (1999-2000). Therefore, the LEP program costs in Seminole County were $3867.00 per student, per year, which was a $674.00 program cost differential, or 21 percent more (1999-2000 expenditures).[29]

The Emergency Immigrant Education Act (EIEA) of 1984 funded the Emergency Immigrant Education Program (EIEP)[30]. EIEA funds provided supplemental education assistance for immigrant students, and for the training of teachers responsible for instructing these students in both public and non-public elementary and secondary schools. Eligible students were classified officially by the U.S. Department of Justice

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[27] Ibid.

[28] Ibid.

[29] Joseph Greene, FTE Administrator, Seminole County Public Schools, Sanford, Florida (2000).

[30] *The Emergency Immigrant Education Act* (EIEA), Title IV, part D of the Elementary and Secondary Education Act, as amended, (20 U.S.C. 3121-3130).

(Immigration and Naturalization Service) as immigrants, and they resided in the United States for less than three years.

In order for a school district to be eligible, it must have had at least 500 students or three percent of its student population classified as immigrants. The federal government provided all funds to the school districts for this program.

Florida Education Finance

Because Florida was one of the major entry ways for newly arrived non-English language background students and families, its public schools faced challenges and expenditures not experienced by many other states. The expenditures were offset somewhat by the Emergency Immigration Education program.

The Florida Department of Education could have used up to 1.5 percent of all funds received for administrative costs.[31] Table 4-1 outlines the state totals for fiscal years 1991-1994.[32]

Table 4-1 Florida EIEP Student Funding (100% Federal Funding)

FISCAL YEAR	NUMBER STUDENTS	FUNDING
1991	18,697	$ 935,940
1992	23,893	$1,017,709
1993	33,075	$1,282,260
1994	43,130	$1,538,453

TOTAL FEDERAL EXPENDITURES **$4,774,362**

Source: Florida Department of Education, Office of Multicultural Student Language Education, September 1993.

[31] "The Unfair Burden" *Immigration's Impact on Florida,* Florida Governor's Office, Tallahassee, FL., March 1994.

[32] These data were the latest available as of April 2000. Further research was in progress by the Florida Department of Education.

Florida's education costs for both legal and illegal immigrants in 1993 were $517.6 million, which was up from 1992's expenditure of $418.5 million. The State spent $254 million alone on the English for Speakers of Other Languages (ESOL) program.[33] The number of students being served in ESOL programs during the 1998-1999 school year was 103,008, and for the 1999-2000 school year the number was 121,783; out of total student (Pre-K through 12) membership of 2,339,358 and 2,376,128 respectively.[34] These numbers reflected only those students being served in the ESOL program, and was not inclusive of all immigrant (legal and illegal) students. These numbers also indicated an 8.5 percent increase in ESOL enrollment in one year with a correlating 9.8 percent increase in the student membership. When compared to the 1995 total student membership of 2,175,233, the fall 1999 membership showed an overall increase of 200,895 students or 9.3 percent.[35]

Education for illegal aliens totaled $180.4 million in 1993. This number represented another 24 percent increase in costs from the previous year when illegal alien education was $145.9 million. The increase was due to the rise in illegal aliens arriving in the state of Florida.[36]

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[33] Florida: Social Policy Issues, (1998) <www.fairus.org/042flsoc.htm>.

[34] Florida Department of Education, Profiles of School District Totals, (February 2000).

[35] Florida Department of Education, 98-99 Full-Time Public School Equivalency Report of Student Enrollment.

[36] "The Unfair Burden," *Immigration's Impact on Florida,* Florida Governor's Office, Tallahassee, FL., March 1994. (Later statewide expenditure figures were not available as April 2000.)

According to the 1990 Census, Florida had about 154,000 Limited English Proficient (LEP) students in the public schools.[37] These were mostly immigrant children and the children of immigrants who required special instruction to prepare them to study in English. [38]

A comprehensive study of the public sector costs of legal and illegal immigration in Florida by Dr. Donald Huddle of Rice University and sponsored by Carrying Capacity Network of Washington, DC, in 1993, assessed: current costs to Florida taxpayers of federal, state and local services in 1992 to immigrants arriving since 1970; prospective costs from 1993 to 2002; and current and prospective tax contributions of immigrants. The costs examined were twenty-five federal, state and local service and assistance programs available to legal immigrants, including a package of local government welfare and health services, and twenty-one programs open to illegal immigrants.

The 1993 Huddle Report put 345,000 illegal immigrants in the State of Florida in 1992 and gave their total cost at $913 million more than their tax contributions.[39] The largest shares of the $5.35 billion paid out for aid and services to Florida's immigrants in 1992 were: Public education, including bilingual, adult and compensatory education,

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[37] *Migration News,* July 7, 1998.

[38] This standard equation of the "immigrant children" population with the "LEP" student population was convenient but imprecise, because many of those designated as LEP were, in fact, native-born U.S. citizens rather than first generation immigrants. Nationally, over one-third of the fourteen million people who were classified as LEP on the basis of the 1990 census data were native-born. Michael Fix and Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight*, (Washington DC, The Urban Institute, 1994).

[39] This report on the net costs of immigration to taxpayers of Florida was a follow-up to Huddle's comprehensive nationwide study, "The Net National Costs of Immigration in 1993" released in June of 1994. The national study pointed out that legal and illegal immigrants who have settled in the U.S. since 1970 cost taxpayers $44.18 billion net in public assistance and worker displacement in 1993, in excess of $76.9 billion they paid in taxes. More than 55% of these costs resulted from legal immigration. Of the 54.6 million people added to the nation's population from 1970 to 1993, 20.7 million or 38% were immigrants. The national and Florida studies are part of a series of immigration cost studies commissioned by Carrying Capacity Network.

$1.2 billion (22.8%); Social Security (20.2%); Local government services (20%); Medicaid (10.2%); and Criminal justice and corrections (5.4%).[40]

Population Data

According to Immigration and Naturalization Service (INS) figures for 1998, population data indicated:

Table 4-2 Immigration and Florida

State population:	15,111,200	(1999 Census Bureau est.)
Foreign-born population:	2,324,000	(1998 Current Population Survey)(CPS)
Percent foreign born:	16.0%	(1998)(CPS)
Immigrant Stock:	4,524,000	(1997 CB est.)
Percent U.S. citizen:	40.5%	(1997 CPS)
Illegal alien population:	350,000	(1996 Immigration and Naturalization Service est.)
New legal immigrants:	605,478	(1991 to 1998)
2025 pop. Projection:	20,710,000	(1996 CB projection)

Source: Immigration and Florida, FAIR, 1999.

Florida had the third largest immigrant population in the United States in 1998 (after California and New York), and the fourth-largest immigrant population share of its total population (after the above two states and Hawaii).[41] More than one of every six of its residents was foreign born. About one in every eleven immigrants in the United States

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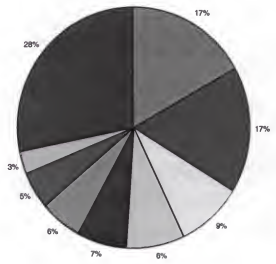
[40] Ibid.

[41] Ibid.

lived in Florida. The majority of Florida's immigrants at that time came from the Caribbean basin. Mexico played a minor role in the settlement pattern.[42]

Florida's undocumented alien students came from a diverse mix of cultures and backgrounds.

17% Haiti
17% Bahamas
9% Canada
8% Nicaragua
7% Mexico
6% Jamaica
5% Columbia
3% Honduras
28% Other



Source: The Unfair Burden, Florida Governor's Office, March 1994

Figure 4-1 Estimated Undocumented Immigrant Population in Florida in 1993 by Country of Origin

Florida received federal assistance to help defray the costs of the incarcerated criminal alien population in the state and to help with welfare benefits that the state had to pay after the 1986 amnesty for illegal aliens.[43] The federal funding fell short of the

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[42] Ibid.

[43] *Immigration Reform and Control Act*, Pub. L. No. 99-603, 100 Stat. 3359 (1986).

costs of immigrants to the state, which led the state to sue unsuccessfully the federal government for additional remuneration.[44] The Supreme Court ruled that the dispute between Florida, along with other states heavily impacted by immigration, and the federal government was a policy issue that must be settled by Congress, which is responsible for creating the nation's immigration laws.

Education Rights of Undocumented Immigrant Students

A free public elementary and secondary education was a right granted to each child in the United States. Federal mandate was augmented by state educational statutes, which required each child be given equal opportunity to receive a suitable program of educational experiences. The state educational statutes implemented and supplemented the federal mandates, and ensured an equal educational opportunity for all children.[45]

All children have dealt with stressful events as they matured. Immigrant students, however, faced additional challenges.[46] The most distressing included violence (often a result of warfare or civil strife in their native lands) and separation from family members. Other stresses included adaptation to a new culture, the challenge of learning a new language, and often, the insult of racial discrimination in this country.[47] Many immigrant families had a difficult time simply making ends meet; many led lives of poverty in urban areas.

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[44] *Chiles v. U.S.*, 95-1249.

[45] Cynthia McDaniels, "Equality of Educational Opportunity: Race and Finance in Public Education," *The Constitution, Courts and Public Schools*, Vol.1, 1992, Yale-New Haven Teachers Institute, Conn.

[46] J. Willshire Carrera, *Immigrant Students: Their Legal Right Of Access To Public Schools: A Guide For Advocates And Educators,* Boston, MA, (National Coalition of Advocates for Students, 1989b).

[47] Ibid.

As a subset of the immigrant population, undocumented children were likely to confront the most distressing experiences of all. In addition to the usual experiences of growing up, and the unusual stress of immigration, undocumented immigrant children worried about deportation.[48] If their undocumented status was discovered, the Immigration and Naturalization Service (INS) had the legal authority to investigate them. Further, the INS could have detained them, apart from their families, in federally operated centers.[49]

Since the *Plyler*[50] decision, states could no longer use residency requirements to deny undocumented children access to a tuition-free public education. Under *Plyler,* undocumented immigrant students had the same right to attend public schools through Grade 12, as did citizens and permanent residents.

School staff needed to be aware and sensitive as they dealt with all immigrant students. In particular, they acted to preserve the right of access, especially by guarding the confidentiality of students' immigration status. In fact, if an undocumented student reasonably perceived that an action had the intent of exposing immigration status, then the right of access was compromised.[51]

Plyler, moreover, required that schools applied the right of access to all immigrant students. This step guarded against improper distinctions between documented and

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[48] Ibid.

[49] J. Morales, *Improvements Ahead in INS Treatment of Detained Children,* Youth Law News, 8(3), 1 (1987).

[50] *Plyler v. Doe,* 457 U.S. 202 (1982).

[51] J. Willshire Carrera, *Educating Undocumented Children: A Review Of Practices And Policies* (Trends and Issues Paper). Charleston, WV, (ERIC Clearinghouse on Rural Education and Small Schools, 1989).

undocumented students.[52] The right of access implied that undocumented students also had access to appropriate special programs available to other students. School staff were not to: (1) Ask about a student's immigration status or request documentation at any time; (2) Bar access to a student on the basis of undocumented status or alleged undocumented status; (3) Treat one student differently from others in order to determine residency, or on the basis of undocumented status; (4) Make inquires of a student from others in order to determine residency; (5) Make inquiries of a student or parent that might expose the undocumented status of either; or (6) Require undocumented students or their parents to apply for Social Security numbers.[53]

Willshire Carrera in his review of practices and policies,[54] recommended that, in responding to the needs of undocumented students, school staff should have: understood the troubled nature of immigrants' daily lives; understood and actively provided the right of access established by *Plyler*; established a school climate that all immigrant students found open and hospitable; provided counseling and guidance that was responsive to the conditions of immigrant students' lives; developed policies and practices that strengthened immigrant students' access to effective instruction; respected immigrant communities native languages and cultures, at the same time, helped immigrant students to learn English; hired, trained, and retained competent staff who provided appropriated

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[52] Ibid.

[53] Because undocumented students are not eligible for Social Security numbers, schools may not require them as a condition of enrollment.

[54] J. Willshire Carrera, *Educating Undocumented Children: A Review Of Practices And Policies* (Trends and Issues Paper). Charleston, WV, (ERIC Clearinghouse on Rural Education and Small Schools, 1989).

services to immigrant students; and developed strong working relationships with immigrant families.

Teachers, administrators, and other school staff worked to treat undocumented students with the same respect and care they showed for other students. Effective instruction, productive school climate, parent involvement, the methods of sound bilingual education, all are needed by undocumented students, as they are by other immigrant, bilingual, and special needs students.[55]

Access to public schools in the United States entitled undocumented students to varied benefits provided by a number of special programs. These programs included: (1) the Emergency Immigrant Education Program;[56] (2) Funds received under Section 204 of the Immigrant Reform and Control Act; (3) the Transitional Program for Refugee Children: (4) Bilingual education programs; (5) Chapter I programs; (6) Headstart programs; (7) Special education: and (8) Free and reduced meal programs. [57]

Immigrant Students

Most immigrant children and their families lived in six states (California, Florida, Illinois, New Jersey, New York, and Texas), and most lived in metropolitan areas.[58] According to the U.S. Department of Education, 78 percent of all immigrant students attended school in just five states (California, Florida, Illinois, New York and Texas),

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[55] J. Willshire Carrera, *Immigrant Students: Their Legal Right Of Access To Public Schools: A Guide For Advocates And Educators,* Boston, MA, (National Coalition of Advocates for Students, 1989b).

[56] The Emergency Immigrant Education Act (EIEA), Title IV, part D of the Elementary and Secondary Education Act, as amended, (20 U.S.C. 3121-3130).

[57] Ibid.

[58] Immigrant Children and Their Families: Issues for Research and Policy, *The Future of Children*, Vol. 5, No. 2, Summer/Fall 1995.

with 45 percent enrolled in California.[59] National estimates of growth in the immigrant student population provided a glimpse of the future face of America: the total school-age population was projected to grow by more than 20 percent, from 34 million in 1990 to 42 million in 2010. It was estimated that children of immigrants would account for more than half of the growth. Further estimations suggested that the number of children of immigrants would rise to 9 million in 2010, representing 22 percent of the school-age population.[60]

Family reunification was a central reason for immigration, and many new immigrants arrived in family groups. Family relationships helped define immigrant children's experiences in the United States, including their eligibility for some social and economic resources.[61]

The prevailing impression was that immigrant students, regardless of their country of origin, did not adjust well to school and performed poorly academically, and drained resources from an already overburdened educational system. However, the notion of a monolithic view of the immigrant student was far from accurate; immigrant children's educational needs and outcomes differed considerably depending on their socioeconomic status, levels of English proficiency, cultural background, and experiences in their country of origin. Many of these sources of diversity affected educational

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[59] U.S. Department of Education. *The Condition Of Bilingual Education In The Nation: A Report To The Congress And The President.* Washington, DC: U.S. Department of Education, 1991.

[60] Michael Fix and Jeffrey S. Passel, *Immigration and Immigrants: Setting the Record Straight.* Washington, DC: Urban Institute, May 1994.

[61] Immigrant Children and Their Families: Issues for Research and Policy, *The Future of Children*, Vol. 5, No. 2, Summer/Fall 1995.

outcomes, which led to highly variable results across and within immigrant groups. Chief among the sources of diversity were social class and language.[62]

There was evidence that immigrant youths performed at least as well academically and stayed in school longer than their U.S.-born majority-group peers of similar class backgrounds.[63] Other Immigrant students performed less well, causing public stereotypes about specific immigrant groups. In addition to social class, the fact that immigrant children were disproportionately represented among students with limited English proficiency (LEP) greatly affected school achievement, in an absolute sense.[64]

Estimates of students with limited English proficiency ranged from 2.3 million[65] to as high as 3.3 million.[66] The Census Bureau further estimated that 1.8 million school-age children lived in households in which no one age 14 or older spoke English "very well."[67] The continued influx of new immigrant groups meant continuing increases in the number of students who entered the American schools with little or no English proficiency.

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[62] Ibid.

[63] Lorraine M. McDonnell and Paul T. Hill, *Newcomers in American Schools: Meeting the educational needs of Immigrant Youth,* Santa Monica, CA: RAND, 1993.

[64] Immigrant Children and Their Families: Issues for Research and Policy, *The Future of Children*, Vol. 5, No. 2, Summer/Fall 1995.

[65] U.S. Department of Education. *The Condition Of Bilingual Education In The Nation: A Report To The Congress And The President.* Washington, DC: U.S. Department of Education, 1991.

[66] David Phillips and N. Crowell, eds. *Cultural Diversity and Early Education*: A Report of a workshop. Washington, DC: National Academy Press, 1994.

[67] Ruben G. Rumbaut, *Origins and destinies: Immigration to the United States Since World War II,* Sociological Forum (December 1994), 9,4: pp.583-621.

Immigrant children with limited English proficiency were eligible to participate in school programs funded by the Bilingual Education Act[68], which authorized the Emergency Immigrant Education program. They could take part in English as a second language (ESL) or Limited English proficiency (LEP) programs.[69]

To the extent that the focus of attention was on immigrant students with limited English proficiency, states, especially those with large numbers of LEP students, had policies and programs that offered language assistance, due in large part to the Civil Rights Act and other federal and state laws.

Additional policy issues that created challenges to educators included the training of teachers to address the special needs of immigrant students, development of appropriate instructional materials for immigrant students, and ensuring that there were assessment instruments in languages other than English and Spanish.[70]

Ethics And The Democracy Of Education

Formal instruction in the United States was originally begun as a means to teach the Bible.[71]

> *"What the best and wisest parent wants for his own child, that must the community want for all of its children."*[72] John Dewey

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[68] Emergency Education Act of 1984.

[69] Immigrant Children and Their Families: Issues for Research and Policy, *The Future of Children*, Vol. 5, No. 2, Summer/Fall 1995.

[70] Ibid.

[71] *Moral Education in the Life of the School.* Association for Supervision and Curriculum Development, Educational Leadership, 46, 4-8. (May 1988).

[72] Raymond D. Boisvert, *John Dewey: Rethinking Our Time,* State University of New York Press, Albany, NY. p.95 (1998).

John Dewey (1859-1952) once called "the guide, the mentor, and the conscience of the American people..."[73] often spoke on major issues of his time. He was considered an educational innovator and believed in the education of all children as a benefit to society.

"The idea of free and common schools developed among us on the grounds that a nation of truly free men and women required schools open to all and hence supported by public taxation."[74] "Upon the whole, considerable progress has been made in making schooling accessible to all, thought it is still true that the opportunity to take advantage of what is theoretically provided for all is seriously limited by economic status."[75] Horace Mann, an educational reformer instrumental in establishing the first normal school in the U.S. in 1839, once said "Education is our only political safety: outside of this ark is the deluge"[76] He was also quoted by Dewey as saying that: "The Common School is the greatest discovery ever made by man. Other social organizations are curative and remedial. This is preventive and antidote."[77]

The institution for which Horace Mann labored, namely, a public school system supported by public taxation and open to all children, had over the passage of more than hundred years been realized to a surprising degree. Education was designed to serve the needs of the democratic society and of the democratic way of life.

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[73] Larry A. Hickman and Thomas M. Alexander, *The Essential Dewey*, Indiana University Press, Bloomington, Ind. (1998).

[74] John Dewey, *Philosophy of Education*, New Jersey: Littlefield, Adams & Co. p. 122 (1958).

[75] Ibid.

[76] Ibid., p. 46.

[77] Ibid.

The idea of *free* and *common* schools was developed on the foundation that a nation of truly free men and women required schools open to all and supported by public taxation. Upon the whole, considerable progress had been made in making schooling accessible to all, though it was still true that the opportunity to take advantage of what was theoretically provided for all was seriously limited by economic status.[78]

Since the idea of the nation was equal opportunity for all, to nationalize education meant to use the schools as a means for making this idea effective. There was a time when simply providing schoolhouses, desks, blackboards and perhaps books could do this.[79] But that day had passed. Opportunities could be equalized only as the schools made it their active serious business to enable all children to become masters of their own fate.[80]

Horace Mann believed that every human being had an *absolute right* to an education. Therefore, it was the correlative duty of every government to see that the means of that education was provided for all.[81]

In February 1823, Representative White of Vermont presented his views on the importance of education to Congress.[82]

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[78] Ibid., p 122.

[79] Hickman and Alexander, *The Essential Dewey.*

[80] Ibid.

[81] Kern Alexander and M. David Alexander, *American Public School Law,* New York, West Publishing Co., 1992, p 25. From the 10th Annual Report, published in *The Common School Journal*, Vol. IX, No. 9, edited by Horace Mann, (Boston: William B. Fowler, 1847).

[82] Annals of Congress, House of Representatives, 17th Congress, 2nd session, U.S. Congressional Documents and Debates, 1774-1873, pp. 960-961.

> "Education is to the republican body politic what vital air is to the natural body, necessary to its very existence, . . . Education ought to be here considered in its broadest sense, as not only embracing literary and scientific, but political, moral, and religious instruction. Let the great body of people be well informed, and their moral character preserved, and they will know and understand their rights and privileges. One hundred dollars, judiciously laid out, in the education of youth, would go further in the maintenance and support of a free Government, and in promoting the prosperity and happiness of the people, than thousands expended in enacting criminal codes, establishing courts of judicature, jails, and penitentiaries without education."[83]

The New Hampshire Supreme Court in 1912 declared that the primary purpose of the maintenance of the common school system was the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depended. Free schooling furnished by the state was not so much a right granted to pupils as a duty imposed upon them for the public good. Public schools were the governmental means of protecting the state from the consequences of an ignorant and incompetent citizenship.[84]

Educating All Children

The philosophy of Horace Mann[85] preached an educational awakening that was ultimately to form the basis for state systems of public education as it became – free of secular public schools supported by both local and state general taxation.[86]

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[83] Ibid.

[84] *Fogg v. Board of Education*, 76 N.H. 296, 82 A. 173, 174-75 (1912) as cited in Alexander, Kern and Alexander, M. David. *American Public School Law,* New York, West Publishing Co., 23-24, (1992).

[85] Horace Mann, 1796-1859, an educational reformer: instrumental in establishing the first normal school in the U.S. in 1939.

In Horace Mann's *Tenth Annual Report to the Massachusetts Board of Education*, (1846), he stated: "I believe in the existence of a great, immutable principle of natural law, or natural ethics, a principle antecedent to all human institutions and incapable of being abrogated by any ordinances of man, a principle of divine origin, clearly legible in the ways of Providence as those ways are manifested in the order of nature and in the history of the race, which proves the *absolute right* of every human being that comes into the world to an education; and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all."[87]

In his *Twelfth Report* (1849)[88] Mann affirmed that "without undervaluing any other human agency, it may be safely affirmed the Common School, may become the most effective and benignant of all the forces of civilization."[89] "As 'the child is father to the man,' so may the training of the schoolroom expand into the institutions and fortunes of the state."[90] " Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men – the balance-wheel of the social machinery."[91]

In *Democracy in America,* Alexis De Tocqueville[92] noted that even in its formative stages our country attempted to be a place in which individuals could achieve an economically viable and socially productive position solely because of their individual

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[86] Alexander and Alexander, *American Public School Law*, p. 21.

[87] Ibid., p 25. From the 10th Annual Report, published in *The Common School Journal*, Vol. IX, No. 9, edited by Horace Mann (Boston: William B. Fowle, 1847).

[88] Ibid. 12th Annual Report, published separately from the *Journal* by Fowle in 1849.

[89] Alexander and Alexander, *American Public School Law*, p. 25.

[90] Ibid., p. 26.

[91] Ibid.

[92] Alexis De Tocqueville, (1805-1859) French statesman and author.

merits and work ethics.[93] He believed that an academic education was the foundation for all future successes of the individual.

Following Horace Mann and Alexis De. Tocqueville came John Dewey[94] who believed that "the individual who is to be educated is a social individual and that society is an organic union of individuals.[95] "The lesson to be learned is that human attitudes and efforts are the strategic center for promotion of the generous aims of peace among nations; promotion of economic security; the use of political means in order to advance freedom and equality; and the worldwide cause of democratic institutions. The basic importance of education is in creating the habits, and the outlook that people are able and eager to secure the ends of peace, and economic stability."[96]

Then, in 1899, the high court of Tennessee saw a need for a uniform system of public schools to promote the general welfare "by educating the people, and thus, by providing and securing a higher state of intelligence and morals, conserve the peace, good order and well-being of society."[97] Following in 1918, school attendance became compulsory in every U.S. state.[98]

The private returns to education received considerable attention in both academic research and public policy discussion. The positive effects of education on individual

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[93] Alexis De Tocqueville, *Democracy in America* (1835) (New York: Alfred A. Knopf, Everyman's Library, 1994), p. 315.

[94] John Dewey (1859-1952), U.S. philosopher and educator.

[95] Hickman and Alexander, *The Essential Dewey*, p. 230.

[96] John Dewey, *Philosophy of Education*, p. 80.

[97] *Leeper v. State*, 103 Tenn. 500, 53 S.W. 962 (1899) as cited in Alexander and Alexander, *American Public School Law*, p. 24.

[98] Alexander and Alexander, *American Public School Law*. (1992).

wages and income were substantial and well documented. Far less attention was given to the public benefits of education[99] --i.e., to the fact that education was a public good whose benefits accrued not only to the individual attending school, but also to society as a whole. Having an educated populace ensured the continuation of American political systems and values. Public education provided a rationale for government support of education; in fact, most education at both the K-12 and the postsecondary levels, was paid for by tax revenues.[100]

These social, or external, benefits of education exceeded the private benefits, that is, those enjoyed by the person who gets the education. For example, education led to reduced crime, improved social cohesion, technological innovations, and inter-generational benefits (the benefits parents derived from their own education and transmitted to their children).[101]

The status of education in society was a direct reflection on the level of civilization a nation achieved. As civilizations progressed, education became more important in creating and sustaining economic and social patterns.[102] Therefore, as immigrants began to fill the nation, they too, required the same basic education as the rest of society.

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[99] N. Stacey, "Social Benefits of Education," *The Annuals of the American Academy,* September 1998, pp. 54-63.

[100] George Vernez, Richard Krop, and Peter Rydel, *Closing the Education Gap: Benefits and Costs*, RAND, 1999, p. 13.

[101] Ibid.

[102] David C. Thompson, R. Craig Wood, and David S. Honeyman, (1994), *Fiscal Leadership for Schools: Concepts and Practices,* Longman, New York.

Summary

With the influx of immigrants since the 1960s, and the rapid changes in the ethnic composition of America's population and the school population, a growing need to see that all were educated became pressing. Based on the educational foundations of the nineteenth and twentieth centuries (Tocqueville, Mann and Dewey) we would have seriously considered and more than likely have seen the importance of, including all children in the free public education process.

Meeting the needs of the immigrant student demanded utilizing all the means necessary to assimilate him/her and to make that student the most productive, contributing member to the economy and American society. In determining the needs of the immigrant student, one would have considered what was best for taxpayers, what was best for non-immigrant children and what was best for the school system and society in general, in the delivery of quality, cost effective instruction to the school-aged citizenry. Enlightened, moral state policies had to find a way to balance the disparate, often competitive, ethical considerations from the various points of view, and constituencies.

CHAPTER 5
IMMIGRANT EDUCATION POLICY INCLUSIONS
FOR THE STATE OF FLORIDA

Introduction

This chapter provides the basis for, and the essential ingredients to, an effective policy for the education of undocumented alien children. The differences in types of policy, federal rules and established state guidelines are reviewed. It also considers some of the cases previously discussed and looks more carefully at Florida legislation. Finally, needed enhancements to Florida immigrant education policy are offered.

The Right to Learn

> "Of all the civil rights for which the world has struggled and fought for 5,000 years, the right to learn is undoubtedly the most fundamental... The freedom to learn ... has been bought by bitter sacrifice. And whatever we may think of the curtailment of other civil rights, we should fight to the last ditch to keep open the right to learn, the right to have examined in our schools not only what we believe, but what we do not believe; not only what our leaders say, but what the leaders of other groups and nations, and the leaders of other centuries have said. We must insist upon this to give our children the fairness of a start which will equip them with such an array of facts and such an attitude toward truth that they can have a real chance to judge what the world is and what its greater minds have thought it might be"[1]

[1] W.E.B. Du Bois, "The Freedom to Learn" *Midwest Journal* 2, Winter 1949, pp. 230-31.

Distinctions

It was important to recognize the distinction of the two types of alien policies, immigrant and immigration. *Immigrant policy* focused on what to do about the effects of immigration upon our society. Immigrant policy addressed the question: What shall we do about immigrants once they are here? Common immigrant policy debates included whether bilingual education helped or hindered the children of immigrants, whether immigrants could receive welfare, and whether non-citizens residents could have voting rights.[2] Immigrant policy was decided at the state level. *Immigration policy* focused on what to do about the laws that admitted immigrants to our country and that created immigration flow. Immigration policy addressed the question: Who and how many people should be allowed to immigrate? Examples of immigration policy debate included whether there could be an overall cap on immigration, how chain migration could be limited, and why so many unskilled immigrants were being admitted.[3] Immigration policy was a federal responsibility.

Immigration Facts

The Immigration and Naturalization Service (INS) estimate of illegal immigrants in Florida in October 1996 was about 350,000. The INS estimated the illegal resident alien population in Florida as of October 1992 was 270,000. This was the fourth largest concentration of illegal aliens in the country, and it reflected a 30 percent increase over the previous four years. These were mostly new illegal resident aliens, as the amnesty for illegal aliens, for which 156,000 applied from Florida, converted the bulk of older illegal

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[2] Immigration Policy versus Immigrant Policy, October 1997. <www.fairus.org/04142710.htm> FAIR

[3] Ibid.

aliens into legal permanent residents. The state government estimated the illegal alien population higher—about 420,000.[4]

The exact number of immigrant students attending Florida public schools was unknown in 1996 or in 2000. The number of immigrant students enrolled in special or gifted student programs was also unknown. The difficulty in identifying the number of immigrant students was due in part to the August, 1990 Consent Decree[5] signed by the Florida Commissioner of Education, Department of Education and the state board of Education with the Multicultural Education training Advocacy, Inc., that prohibited education officials from requesting certain information on the residency status of the students' family.

Federal Policies and Laws

In 1982, the Supreme Court ruled in *Plyler V. Doe*, that public schools were prohibited from denying immigrant students access to a public education from kindergarten through grade 12 on the basis of their immigration status. More specifically, the Court found that undocumented immigrant children and young adults had the same right to attend free public elementary and secondary schools as their U.S. citizen counterparts. As such, states and the public schools in each state were prohibited from enacting or adopting laws, regulations, or practices which denied or resulted in the denial of this right.[6]

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[4] Florida: Illegal Immigration, December 1998 <www.fairus.org/042flill.htm>.

[5] *League of United Latin American Citizens* (LULAC) *et al. v. the State Board of Education et al. Consent Decree,* U.S. District Court for the Southern District of Florida, August 14, 1990.

[6] John Willshire Carrera, *Immigrant Students: Their Legal Right of Access to Public Schools*, (1992). National Coalition of Advocates for Students, Boston, MA.

In addition to their *Plyler* right of access, under state law, both documented and undocumented immigrant students were obligated to attend primary and secondary schools until they reached a mandated age (age sixteen in the state of Florida). Conversely, states were obligated to enforce these laws with regard to immigrant students, as with U.S. citizens and permanent residents.[7]

Therefore, public schools and public school personnel were prohibited under *Plyler* from adopting policies or taking action to deny or which resulted in the denial of the right of access to resident immigrant students on the basis of their immigrant status, and in particular, undocumented immigrant students[8] on the basis of their undocumented status.

> Education is perhaps the most important function of state and local governments...[I]I is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[9]

The Fourteenth Amendment to the United States Constitution provided in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment to the Constitution was not confined to the protection of citizens. The provisions were universal in their application, to al persons within the

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[7] Ibid.

[8] Undocumented students, for this purpose, are students (K-12) who reside in the United States without legal immigration status. That is, students who entered the U.S. without going through the Immigration and Naturalization Service and remained here without valid immigration papers or student who entered with valid visas and who have since fallen out of status.

[9] *Brown v. Board of Education*, 347 US 483, 493 (1954).

territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the protection of the laws was a pledge of the protection of equal laws.[10]

The federal statute regarding English Language Learners was the Equal Education Opportunities Act (EEOA).[11] It provided that:

> "No states shall deny equal education opportunity to an individual on account of his race, color, sex, or national origin by -
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

In addition, Title VI of the Civil Rights Act[12] states:

> "No person in the United States shall, on the ground of race color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

In *Lau v. Nichols,*[13] the United States Supreme Court held that the San Francisco School District's failure to provide supplemental English Language instruction to Chinese speaking students violated Title VI of the Civil Rights Act at 42 U.S.C. § 2000d.

Following the *Lau* case, the Fifth Circuit Court of Appeals decided the case of *Castaneda v. Pickard.*[14] In this case the federal appellate court stated a three-pronged test to determine whether a school district's language remediation program was appropriate. First, the court must determine whether a school district was pursuing a program

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[10] *Yick Wo v. Hopkins,* 118 U.S. 369 (1886).

[11] *Equal Education Opportunities Act* (EEOA) at 20 U.S.C. § 1703.

[12] Title VI of the Civil Rights Act at 42 U.S.C. § 2000d

[13] *Lau v. Nichols* (1974) 414 U.S. 53.

"informed by legitimate experimental strategy."[15] Second, the court must establish whether " the programs and practices actually used by the school system were reasonably calculated to implement effectively the educational theory adopted by the school."[16] And, third, the court must determine whether the school's program, although premised on sound educational theory and effectively implemented, "produced results indicating that the language barriers confronting students were actually being overcome."[17]

In *Castaneda v. Pickard*[18] (1986) the Court reiterated that Congress, in enacting Section 1703 (f), intended to leave the state and federal educational authorities a substantial amount of latitude in choosing the programs and techniques they would use. In *Keyes v. School District No.1,* [19] the *Castaneda* test was applied to the Denver public schools and the Court noted that the law did not require perfection, but the districts had a duty to take appropriate action to eliminate language barriers that prevented students from participating equally in educational programs. In the *Teresa P. v. Berkeley Unified School District*[20], the three-pronged standard was utilized. The District Court held that the EEOA did not require a school district to adopt a specific educational theory or to implement an ideal academic program. It solely required the district to make a good faith effort to provide teachers competent to teach English as a Second Language (ESL), and

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[14] *Castaneda v. Pickard,* (1981) 648 F.2d 989.

[15] Ibid., p. 1009.

[16] Ibid., p. 1010.

[17] Ibid.

[18] *Castaneda v. Pickard,* (1986) 781 F 2d 456 (*Castaneda* II).

[19] *Keyes v. School District No.1*, (1983) 724 F. Supp. 1503.

[20] *Teresa P. v. Berkeley Unified School District,* (1989) 724 F. Supp. 698.

even though the district could not obtain all of the necessary credentialed teachers, it demonstrated an effort to hire as many teachers as possible. The Court also approved testing procedures, which included a validated test and classroom teacher assessment as to the English skills of the students. The Court had difficulty determining how to measure the efficacy of a district's bilingual program and accepted as good evidence the fact that bilingual students were progressing at about the same rate as other bilingual students in the state of California.

Therefore, federal statutes and case law required that school districts take appropriate action to overcome language barriers that could impede student achievement. The specific action was left to the discretion of the school district so long as it was based on: 1) a sound educational theory; 2) sufficient resources were implemented to enact the theory; and 3) if after a period of time, students were not making progress, a different approach was provided to the students. The federal law did not require bilingual nor primary language education. However, the federal law did require that staff members were trained and experienced in English language acquisition skills and that assessment programs were meaningful and validated.

Florida Legislation

On August 14, 1990 a Consent Decree was signed in United States District Court on behalf of the Florida State Board of Education and of the plaintiffs who had alleged that the State Board of Education had not complied with its obligations under federal and state law to ensure that the Florida school districts provided equal and comprehensible instruction to limited English proficient (LEP) students.

The Consent Degree, variously known as the English for Speakers of Other Languages (ESOL) Agreement, the Department of Education (DOE)—Multicultural Education Training Advocacy, Inc. (META) Agreement, and the Doe-META Consent Decree, governed the education of LEP students in the state of Florida, in grades Pre-K to 12.

The Consent Decree was incorporated into Florida Statutes (233.058) and State Board of Education Rules (6A-6.900 - 6A-6.909). The viability of the decree does not, however, depend on its being sanctioned by state statute and rule.

The essence of the Consent Decree was the right of LEP students to comprehensible instruction. Comprehensible instruction was predicated upon appropriate student assessment and placement, equal access by LEP students to all educational programs, and training of instructional, administrative and staff personnel on the instructional requirements of LEP students.

The Consent Decree required that students be provided comprehensible instruction in English language arts and subject matter content. Instruction needed to reflect ESOL strategies that ensured students acquired literacy in English. No specific curricula was designated at the state level because students were expected to have access to a full curriculum on par with their English-proficient peers.[21]

Florida School Laws

Florida school laws were based on precedent federal and state polices and rules.

> **232.01** Regular school attendance required between ages of 6 and 16; permitted at age of 5; exceptions. —

[21] Sandra H. Fradd, and Okhee Lee, (1998). *Creating Florida's Multilingual Global Workforce.* Tallahassee, FL: Florida Department of Education.

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(a) All children who have attained the age of 6 years or who will have attained the age of 6 years by February 1 of any school year or who are older than 6 years of age but who have not attained the age of 16 years, except as hereinafter provided, are required to attend school regularly during the entire school term.

(f) Homeless children, as defined in s. 228.041, must have access to a free public education and must be admitted to school in the school district in which they and their families live. School districts shall assist homeless children to meet the requirements of §. 232.03, 232.03115, and 232.032, as well as local requirements for documentation.[22]

233.058 English Language Instruction for limited English proficient students. —

(1) Instruction in the English language shall be provided to limited English proficient students. Such instruction shall be designed to develop the student's mastery of the four language skills, including listening, speaking, reading, and writing, as rapidly as possible. Limited English proficient students who are eligible other categorical or special programs, such s Chapter I and exceptional student education, shall also participate in such services in accordance with the requirements of the respective program. [23]

(3) Each school district shall implement the following procedures:

(a) Develop and submit a district plan for providing English language instruction for limited English proficient students to the Department of Education for review and approval.

(b) Identify limited English students through assessment.

(c) Provide for student exit from and reclassification into the program.

(d) Provide limited English proficient students ESOL instruction in English and ESOL

[22] Florida Department of Education, *Florida School Laws*, Chapter 228-246 Florida Statutes, 1999.

[23] Ibid.

instruction or home language instruction in the basic subject areas of mathematics, science, social studies and computer literacy.
(e) Maintain a student plan.
(f) Provide qualified teachers.
(g) Provide equal access to other programs for eligible limited English proficient students based on need.
(h) Provide for parent involvement in the program.[24]

Florida's Education Strategic Priorities

The mission of Florida's public education system in the year 2000 was to provide the opportunity for all Floridians to attain the knowledge and skills necessary for lifelong learning and to become self-sufficient, contributing citizens of society.[25]

In order to focus education improvement efforts that led to the achievement of this mission, Commissioner Gallagher provided leadership in the development of a strategic plan that described the strategic direction for the following priority issues:

Priority Issue 1: Highest Student Achievement. All students, regardless of environment or economic status, were given the opportunity to attain the highest possible levels of academic achievement, obtaining the knowledge and skills necessary for lifelong learning and to become self-sufficient, contributing citizens of society.[26]

Priority Issue 2: Safe Learning Environment. Florida's school sites and settings were safe and secure places in which to learn.[27]

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[24] Ibid., Chapter 233.

[25] Office of Organizational and Employee Development, Florida Department of Education (2000).

[26] Ibid.

[27] Ibid.

Priority Issue 3: Increased Government Efficiency. Florida's public education system worked with all stakeholders to develop and continually improve a systematic process for maximizing its effectiveness in meeting the needs of its citizenry.[28]

Policy Enhancements

State education policy made it clear to all district school personnel that, as educators, their primary responsibility was to provide all students who were residents of their community with a quality education. In responding to the needs of undocumented students, Florida state policy needed to continue its mandated federal and state programs and strategies. To be considered in addition were:

1) Immigrant student inclusion in all school and district assessments and reports; Florida state school board policies allowed for special accommodations for the LEP student. Accommodations included giving additional time to complete the test, use of an Heritage language-to-English dictionary, the opportunity to be tested separately with other LEP students, and the ESOL teacher was permitted to answer general test direction questions in the heritage language. In addition to separating LEP student scores for documentation and benchmarking purposes, their test scores needed to be indicated inclusively as part of the overall assessment reports. Score inclusion should be limited to those LEP students who had been receiving ESOL classes for a minimum of two years.
2) Greater staff participation in training directed toward understanding of the special needs of immigrant children;

[28] Ibid.

All public school teachers within the state of Florida were required by the Consent Decree and Florida Statutes to have three semester hours or 60 in-service credit points of training in the methods of teaching students of limited English proficiency. In addition, certification as an ESOL teacher required 15 semester credit hours or 300 in-service credit points in the methods of teaching English to ESOL students, ESOL curriculum and materials development, cross-cultural communication and understanding, testing and evaluation of ESOL students and applied linguistics. Supplementary staff preparation on the needs and cultural heritage of the undocumented immigrant student was needed. Monetary incentives could have increased participation of teachers.

3) Development of additional instructional materials for immigrant children; Instructional materials for ESOL programs were available to Florida school districts. Many books were available in dual languages, which accelerated the assimilation of the English language for many of the immigrant students. Additional integration materials, to assist with basic subject instruction such as mathematics, and computer literacy, needed to be developed and put into practice. Utilizing experiential learning techniques in the non-ESOL classroom would have assisted immigrant students with learning and understanding of concepts. The development of materials was costly but made possible by grants and other funding.

4) Assessment instruments in languages other than English and Spanish;

Florida had assessment instruments available in Spanish, though they were not widely used in all districts. Lack of uniform or consistent utilization caused flawed results in overall test scores, by improperly measuring student achievement. Resources were available to assist LEP students test interpretation, but no correct answers could be given. Florida needed to develop assessment instruments in Haitian Creole as Haiti accounted for 17 percent of undocumented immigrants in 1993. The highest percentage of illegal immigrants was from Hispanic speaking countries. It was difficult to find experts in many of the other language fields.

5) Increased school counseling services for immigrant children;

Counseling services were available to immigrant children, but few took advantage due to the language barrier problem. Many Florida school districts experienced a shortage of bi-lingual school counselors. Increased recruitment efforts in this area were necessary, as well as for male counselors to serve as role models for Hispanic and other immigrant youth. Incentives for existing school counselors and teachers to learn to communicate with students in a language other than English were needed. The inclusion of additional training in the understanding the culture, and experiences of the undocumented immigrant child was indicated. By 2005, the school-age population of white students would have declined by 3 percent, while an increase would be experience by African American students (8 percent), Hispanic students (30 percent), Asian and Pacific

Islander students (39 percent), and Naïve American students (6 percent).[29] School counseling staffs were composed mostly of white or black women. Incentives were needed to entice more Hispanics and men into the school counseling field.

6) Increased immigrant parent involvement in overall school programs;

A prelude to more effective parent involvement programs should have included a careful examination of what was actually known about culturally different families, their attitudes regarding education and how they supported their children's education through the family and their informal social networks. It was important to help the immigrant parent to understand the U.S. educational system. Immigrant parents often came from cultures where the proper role of the concerned parent was non-interventionist in nature. Parents from such background believed they should not intervene in the school's business or question the teacher's practices and expertise. Most Hispanic parents felt parent intervention constituted of interference in the affairs of the school. Many did not understand that they were expected to interact with schools to show that they valued education and wanted their children to learn.[30] As their children adapted into the American education culture, it was considered necessary by the school staffs to have contact with the immigrant parents. Although many districts had parent involvement programs, convincing the

[29] Annie E. Casey Foundation. *1997 Kids Count: USA Profile,* Baltimore, Maryland: Annie E. Casey Foundation, 1997.
[30] Pam McCollum, *Obstacles to Immigrant Parent Participation in Schools,* Intercultural Development Research Association Newsletter (IDRA), November-December 1996.

immigrant parent that involvement in their children's learning was the preferred behavior was difficult. A key to parent involvement involved keeping the parents well informed about the ESOL program as well as the general curricula and other activities in which the students participated. Correspondence sent to the home should have been in the home language, as should the information they received at school. Immigrant parents should feel welcomed and encouraged to interact with the school. Parents were encouraged to help at home and in the classroom, and given the opportunity to have input in the various decisions the school had to make, from how many computers to purchase to how much homework students should have.[31] PTA programs needed to include activities such as; meet-the-teacher nights, native language guest speakers, cross-cultural dinners, or culture fairs exhibiting customs of the students' former countries. Parents were invited to attend athletic, academic and performing arts activities. Everything needed to be done to ensure that the school was perceived as a safe, non-threatening haven where the parent could be included in the education of their children.

7) Inclusion of limited English proficient children in all school-wide programs; With so many LEP students in Florida, and with a heavier concentration in some counties more than others, provisions were needed to accommodate the inclusion of LEP students in school-wide programs. It was difficult for a student to feel part of something when they could not understand

what was being said or done. English language interpreters and students who were already bi-lingual assisted in this effort. Student to student mentoring was another good method of connecting immigrant students to the overall school culture. Mixed group dynamics as members of the same team also helped to overcome some cultural biases. It was inherently difficult to move these children with groups other than the one where they felt most comfortable.

8) Determine what investments the public was willing to make to ensure the education and future economic success of immigrant children.[32]

Convincing tax-paying public to increase education spending was a monumental task. Many of Florida's taxpayers migrated here from other states in order to retire. These people did not want to fund an education for children that did not belong to them. Many felt they had done their duty in their former states of residence and were hard-pressed to consider additional taxation for educational funding. Voters had defeated most attempts at increases in property tax millage, increases in sales tax and bond issues. A publicity plan needed to be developed to provide better information the public of the benefits to society in general, that came from the fiscal support of education. Successful programs have a well-defined system of accountability and outcome data. A well-informed public was much more likely to support programs that could show actual results. To

[31] Abelardo Villarreal and Adela Solis, *Effective Implementation of Bilingual Programs: Reflections from the Field,* IDRA Newsletter, January 1998.
[32] Immigrant Children and Their Families: Issues for Research and Policy, *The Future of Children*, Vol. 5, No. 2, Summer/Fall 1995.

support this need for public education, plans were needed to involve taxpayers, esp. retirees, from the ground up, issue by issue, in addressing those needs and in determining least-cost solutions and responsible use of funds.

Additional strategies like School-to-Work, that provided career exploration activities as they related to post-secondary education, needed to be developed to encourage immigrant youths ages 14-17 to pursue their secondary education. Policies should be able to address immigrant students' special needs within the context of education reform efforts emphasizing systemic initiatives to improve educational outcomes for all children. Failure to do so would result in hundreds of thousands of young people without a high school diploma and without prospects for economic mobility over their lifetime.

Summary

Public education was not a "right" granted to individuals by the Constitution.[33] But neither was it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child marked the distinction. The "American people had always regarded education and [the] acquisition of knowledge as matters of supreme importance."[34] They recognized "the public schools as a most vital civic institution for the preservation of a democratic system

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[33] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

[34] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923).

of government,[35] and as the primary vehicle for transmitting the values on which our society rests."[36]

Early in our history, some degree of education was necessary to prepare citizens to effectively and intelligently participate in our open political system if we were to preserve freedom and independence.[37] These historic perceptions of the public schools as instilling the fundamental values necessary to the maintenance of a democratic political system were confirmed by the observations of social scientists.[38] In addition, education provided the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education had a fundamental role in maintaining the fabric of our society. We did not ignore the significant social costs borne by our Nation when select groups were denied the means to absorb the values and skills upon which our social order rests.[39]

While most children of immigrants were doing well, a portion was indeed "falling through the cracks." The population that continued to have limited English proficiency (LEPs), was, as a group, not simply less capable linguistically than other students. Rather, they belonged to a different and more vulnerable group than the majority of their peers. They had one or both parents unemployed, parents who may have entered the country illegally, lived in poorer neighborhoods, were more likely to have grown up in female-headed households and households with higher levels of conflict, and tended to be

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[35] *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (BRENNAN, J., concurring).

[36] *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979).

[37] *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972).

[38] *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979).

[39] *Plyler v. Doe*, 457 US 202 (1982).

older boys. A substantial proportion of the LEP youth were US-born, suggesting that their problem was not simply recency of arrival from another country. Any policies meant to address their needs needed to be much more systematic and intensive than simply offering them additional language instruction.[40]

Given the modest family origins and material resources of many of these children, their aspirations and expectations were at odds with what many were able to achieve: it remained an open empirical question what would happen to these youth if their aspirations were frustrated, and what the consequences would be if they were, not just for the students themselves, but for the nation as a whole.

America in the future will be more racially, ethnically, and culturally diverse than ever before, largely as a result of immigration patterns. Children, far from being a fringe element of America's population, will continue to be a large and increasing core ingredient of our communities, our schools, and our society.[41]

As a nation and a state, Florida had been doing a satisfactory job of achieving the goal of educating immigrant children in elementary and secondary education on par with non-immigrant children. To be even more effective, the immigrant education programs needed the careful consideration of equality and equity for all children. Education policy, therefore, should sustain and further develop initiatives designed to provide quality educational opportunities for ALL children, of all races and ethnicities and of all circumstances, who reside within the state of Florida.

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[40] Ibid., p. 13.

[41] Ibid., p. 15.

APPENDIX

***Plyler V. Doe*, [457 U.S. 205]**

OPINIONS OF THE COURT:

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. MARSHALL, J., post, p. 230, BLACKMUN, J., post, p. 231, and POWELL, J., post, p. 236, filed concurring opinions. BURGER, C.J., filed a dissenting opinion, in which WHITE, REHNQUIST, and O'CONNOR, JJ., joined, post. [457 U.S. 205] BRENNAN, J., lead opinion

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime,[1] and those who have entered unlawfully are subject to deportation.[2] But, despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various states, including the state of Texas.

In May, 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not "legally

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[1] 8 U.S.C. 1325

[2] 8 U.S.C. 1251, 1252 (1976 ed. and Supp. IV).

admitted" into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country.[3] These cases involve constitutional challenges to those provisions.

[457 U.S. 206][4]

> That section provides, in pertinent part:
> "(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.
> "(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
> "(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district."

Plyler v. Doe was a class action, filed in the United States District Court for the Eastern District of Texas in September, 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Texas, who could not establish that they had

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[3] [Texas Education Code Ann. 21.031 (Vernon Supp.1981) Despite the enactment of 21.031 in 1975, the School District had continued to enroll undocumented children free of charge until the 1977-1978 school year. In July, 1977, it adopted a policy requiring undocumented children to pay a "full tuition fee" in order to enroll. Section 21.031 had not provided a definition of "a legally admitted alien." Tyler offered the following clarification: "A legally admitted alien is one who has documentation that he or she is legally in the United States, or a person who is in the process of securing documentation from the United States Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." App. to Juris. Statement in No. 80-1538, p. A-38. Ed.]

[4] 457 U.S. 206. No. 8158 *Plyler* v. *Doe*.

been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District. The Superintendent James Plyler, and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December, 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief. [457 U.S. 207]

In considering this motion, the District Court made extensive findings of fact. The court found that neither Section 21.031 of the Texas Education Code nor the School District policy implementing it had "either the purpose or effect of keeping illegal aliens out of the State of Texas."[5] Respecting defendants' further claim that 21.031 was simply a financial measure designed to avoid a drain on the State's fisc, the court recognized that the increases in population resulting from the immigration of Mexican nationals into the United States had created problems for the public schools of the State, and that these problems were exacerbated by the special educational needs of immigrant Mexican children. The court noted, however, that the increase in school enrollment was primarily attributable to the admission of children who were legal residents.[6] It also found that,

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[5] 458 F.Supp. 569, 575 (1978).

[6] Ibid., pp. 575-576. [Plaintiffs' expert, Dr. Gilbert Cardenas, testified, "fifty to sixty per cent . . . of current legal alien workers were formerly illegal aliens." Ibid., p. 577. A defense witness, Rolan Heston, District Director of the Houston District of the Immigration and Naturalization Service, testified that undocumented children can and do live in the United States for years, and adjust their status through marriage to a citizen or permanent resident. Ibid. The court also took notice of congressional proposals to "legalize" the status of many unlawful entrants. Ibid., pp. 577-578. See also n. 17, infra. Ed.]

while the "exclusion of all undocumented children from the public schools in Texas would eventually result in economies at some level,"[7] funding from both the State and Federal Governments was based primarily on the number of children enrolled. In net effect, then, barring undocumented children from the schools would save money, but it would "not necessarily" improve "the quality of education."[8] The court further observed that the impact of 21.031 was borne primarily by a very small subclass of illegal aliens, "entire families who have migrated illegally and -- for all practical purposes -- permanently to the United States."[9] Finally, the court noted that, under current laws and practices, "the illegal alien of today may well be the legal alien of tomorrow," and that, without an education, these undocumented children, already disadvantaged as a result of poverty, lack of English-speaking ability, and undeniable racial prejudices, . . . will become permanently locked into the lowest socio-economic class.[10]

The District Court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that 21.031 violated that Clause. Suggesting that the state's exclusion of undocumented children from its public schools . . . may well be the type of invidiously motivated state action for which the suspect classification doctrine was designed, the court held that it was unnecessary to decide whether the statute would survive a "strict scrutiny" analysis because, in any

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[7] Ibid.,, p. 576.

[8] Ibid., p. 577.

[9] Ibid., p. 578.

[10] Ibid., p. 577.

event, the discrimination embodied in the statute was not supported by a rational basis.[11] The District Court also concluded that the Texas statute violated the Supremacy Clause.[12]

The Court of Appeals for the Fifth Circuit upheld the District Court's injunction.[13] The Court of Appeals held that the District Court had erred in finding the Texas statute preempted by federal law. With respect to [457 U.S. 209] equal protection, however, the Court of Appeals affirmed in all essential respects the analysis of the District Court,[14] concluding that 21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test," [15] We noted probable jurisdiction.[16]

During 1978 and 1979, suits challenging the constitutionality of 21.031 and various local practices undertaken on the authority of that provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas. Each suit named the State of Texas and the Texas Education Agency as defendants, along with local officials.[17] In November 1979, the Judicial Panel on Multi-district Litigation,

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[11] Ibid., p. 585.

[12] Ibid., pp. 590-592. [The court found 21.031 inconsistent with the scheme of national regulation under the Immigration and Nationality Act, and with federal laws pertaining to funding and discrimination in education. The court distinguished De Canas v. Bica, 424 U.S. 351 (1976), by emphasizing that the state bar on employment of illegal aliens involved in that case mirrored precisely the federal policy, of protecting the domestic labor market, underlying the immigration laws. The court discerned no express federal policy to bar illegal immigrants from education. 458 F.Supp. pp. 590-592. Ed.]

[13] 628 F.2d 448 (1980).

[14] Ibid., pp. 454-458.

[15] Ibid., p. 458.

[16] 451 U.S. 968 (1981). No. 8194 In re: *Alien Children Education Litigation*

[17] [The Court of Appeals noted that *De Canas v. Bica*, had not foreclosed all state regulation with respect to illegal aliens, and found no express or implied congressional policy favoring the education of illegal aliens. The court therefore concluded that there was no preemptive conflict between state and federal law. 628 F.2d pp. 451-454. Ed.]

on motion of the State, consolidated the claims against the state officials into a single action to be heard in the District Court for the Southern District of Texas. A hearing was conducted in February and March 1980. In July 1980, the court entered an opinion and order holding that 21.031 violated the Equal Protection Clause of the Fourteenth Amendment.[18] The court held that the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit.[19] The court determined that the State's concern for fiscal integrity was not a compelling state interest; that exclusion of these children had not been shown to be necessary to improve education within the state;[20] and that the educational needs of the children statutorily excluded were not different from the needs of children not excluded. The court therefore concluded that [457 U.S. 210] 21.031 was not carefully tailored to advance the asserted state interest in an acceptable manner.[21] While appeal of the District Court's decision was pending, the Court of Appeals rendered its decision in No. 80-1538. Apparently on the strength of that opinion, the Court of Appeals, on February 23, 1981, summarily affirmed the decision of the Southern District. We noted probable jurisdiction,[22] and consolidated this case with No. 80-1538 for briefing and argument.

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[18] In re: *Alien Children Education Litigation*, 501 F.Supp. 544. [The court concluded that 21.031 was not preempted by federal laws or international agreements. 501 F.Supp. pp. 584-596. Ed.]

[19] Ibid., p. 582.

[20] Ibid., pp. 582-583.

[21] 457 U.S. 210

[22] 452 U.S. 937 (1981). [Appellees in both cases continue to press the argument that 21.031 is preempted by federal law and policy. In light of the disposition of the Fourteenth Amendment issue, we have no occasion to reach this claim. Ed.]

The Fourteenth Amendment provides that [n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.) Appellants argue at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.[23] Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.[24]

Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons within its jurisdiction, while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not "within the jurisdiction" of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment support that constricting construction of the phrase "within its jurisdiction."[25] We have never suggested that the class of persons who might avail

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[23] *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[24] *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

[25] [Although we have not previously focused on the intended meaning of this phrase, we have had occasion to examine the first sentence of the Fourteenth Amendment, which provides that "[a]ll persons born or

themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized [457 U.S. 212] that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority.

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the protection of the laws is a pledge of the protection of equal laws."[26]

In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries

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naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ." (Emphasis added.) Justice Gray, writing for the Court in *United States v. Wong Kim Ark,* 169 U.S. 649 (1898), detailed at some length the history of the Citizenship Clause, and the predominantly geographic sense in which the term "jurisdiction" was used. He further noted that it was impossible to construe the words "subject to the jurisdiction thereof," in the opening sentence [of the Fourteenth Amendment], as less comprehensive than the words "within its jurisdiction," in the concluding sentence of the same section; or to hold that persons "within the jurisdiction" of one of the States of the Union are not "subject to the jurisdiction of the United States." Ibid., p. 687.]
[Justice Gray concluded that [e]very citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. Ibid., p. 693. As one early commentator noted, given the historical emphasis on geographic territoriality, bounded only, if at all, by principles of sovereignty and allegiance, no plausible distinction with respect to Fourteenth Amendment "jurisdiction" can be drawn between resident aliens whose entry into the United States was lawful, and resident aliens whose entry was unlawful. See C. Bouve, Exclusion and Expulsion of Aliens in the United States pp. 425-427 (1912). Ed.]

[26] *Yick Wo*, pp. 369.

of a State.[27] Our cases applying the Equal Protection Clause reflect the same territorial theme:[28] Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities, each responsible for its own laws establishing the rights and duties of persons within its borders.[29] There is simply no support for appellants' suggestion that "due process" is somehow of greater stature than "equal protection," and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in identifying subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection

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[27] *Wong Wing*, p. 238. [In his separate opinion, Justice Field addressed the relationship between the Fifth and Fourteenth Amendments: The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws. . . . The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar -- in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws. Wong Wing v. United States, 163 U.S. pp. 242-243 (concurring in part and dissenting in part). Ed.]

[28] 457 U.S. 213. [*Leng May Ma v. Barber*, 357 U.S. 185 (1958), relied on by appellants, is not to the contrary. In that case, the Court held, as a matter of statutory construction, that an alien paroled into the United States pursuant to 212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. 1182(d)(5) (1952 ed.), was not "within the United States" for the purpose of availing herself of 243(h), which authorized the withholding of deportation in certain circumstance. The conclusion reflected the longstanding distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings. The undocumented children who are appellees here, unlike the parolee in *Leng May Ma*, could apparently be removed from the country of pursuant to deportation proceedings. 8 U.S.C. 1251(a)(2). See 1A C. Gordon & H. Rosenfield, Immigration Law and Procedure 3.16b, p. 3-161 (1981). Ed.]

[29] *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938).

Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection. [457 U.S. 214]

The congressional debate concerning Article 1 of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the law was provided to the alien population. Representative Bingham reported to the House the draft resolution of the Joint Committee of Fifteen on Reconstruction[30] that was to become the Fourteenth Amendment.[31] Two days later, Bingham posed the following question in support of the resolution:

Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential to the unity of the Government and the unity of the people that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?[32]

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[30] H.R. 63.

[31] Congressional.Globe, 39th Cong., 1st Sess., 1033 (1866). [Representative Bingham's views are also reflected in his comments on the Civil Rights Bill of 1866. He repeatedly referred to the need to provide protection, not only to the freedmen, but to "the alien and stranger," and to "refugees . . . and all men." Congressional Globe, 39th Cong., 1st Sess., 1292 (1866). Ed.]

[32] Ibid., p. 1090.

Senator Howard, also a member of the Joint Committee of Fifteen, and the floor manager of the Amendment in the Senate, was no less explicit about the broad objectives of the Amendment, and the intention to make its provisions applicable to all who "may happen to be" within the jurisdiction of a State: [457 U.S. 215]

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . It will, if adopted by the States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all person who may happen to be within their jurisdiction.[33]

Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction -- either voluntarily, or involuntarily in

[33] Ibid., p. 2766 (emphasis added).

accordance with the Constitution and laws of the United States -- he is entitled to the equal protection of the laws that a State may choose to establish.

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the[34] United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn. III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike."[35] But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same."[36] The initial discretion to determine what is "different" and what is 'the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the state to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

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[34] 457 U.S. 216.

[35] *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[36] *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus, we have treated as presumptively invidious those classifications that disadvantage a "suspect class,"[37] or that impinge upon the exercise of a "fundamental right."[38] With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances, we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it

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[37] [Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice, rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Finally, certain groups, indeed largely the same groups, have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); see *United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938). The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish. Ed.]

[38] [In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein. But we have also recognized the fundamentality of participation in state "elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), even though "the right to vote, per se, is not a constitutionally protected right." *San Antonio Independent School District*, pp. 35, n. 78. With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise, as the guardian of all other rights. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Ed.]

may fairly be viewed as furthering [457 U.S. 219] a substantial interest of the State. We turn to a consideration of the standard appropriate for the evaluation of 21.031. A

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants -- numbering in the millions -- within our borders.[39] This situation raises the specter of a permanent [457 U.S. 219] caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.[40] The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.[41]

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[39] [The Attorney General recently estimated the number of illegal aliens within the United States at between 3 and 6 million. In presenting to both the Senate and House of Representatives several Presidential proposals for reform of the immigration laws -- including one to "legalize" many of the illegal entrants currently residing in the United States by creating for them a special status under the immigration laws -- the Attorney General noted that this subclass is largely composed of persons with a permanent attachment to the Nation, and that they are unlikely to be displaced from our territory: We have neither the resources, the capability, nor the motivation to uproot and deport millions of illegal aliens, many of whom have become, in effect, members of the community. By granting limited legal status to the productive and law-abiding members of this shadow population, we will recognize reality and devote our enforcement resources to deterring future illegal arrivals. Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 9 (1981) (testimony of William French Smith, Attorney General). Ed.]

[40] [As the District Court observed in No. 80-1538, the confluence of Government policies has resulted in the existence of a large number of employed illegal aliens, such as the parents of plaintiffs in this case, whose presence is tolerated, whose employment is perhaps even welcomed, but who are virtually defenseless against any abuse, exploitation, or callous neglect to which the state or the state's natural citizens and business organizations may wish to subject them. 458 F.Supp. pp. 585. Ed.]

[41] [We reject the claim that "illegal aliens" are a "suspect class." No case in which we have attempted to define a suspect class, see, e.g., n. 14, has addressed the status of persons unlawfully in our country. Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is the product of voluntary action. Indeed, entry into the class is itself a crime. In addition, it could hardly be suggested that undocumented status is a "constitutional irrelevancy." With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants.[42] At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status."[43] Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice. [V]isiting . . . condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth, and penalizing the . . . child is an ineffectual--as well as unjust--way of deterring the parent.[44]

State may independently exercise a like power. But if the Federal Government has, by uniform rule, prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See De Canas v. Bica, 424 U.S. 351 (1976). Ed.]

[42] *Plyler*, 457 U.S. 220

[43] *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

[44] *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic, since it is the product of conscious, indeed unlawful, action. But 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of 21.031. [457 U.S. 221]

Public education is not a "right" granted to individuals by the Constitution.[45] But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions and the lasting impact of its deprivation on the life of the child mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance."[46] We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government,"[47] and as the primary vehicle for transmitting "the values on which our society rests."[48] [A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.[49] And these historic

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[45] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).

[46] *Meyer* v. *Nebraska*, 262 U.S. 390, 400 (1923).

[47] *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963) (BRENNAN, J., concurring).

[48] *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979).

[49] *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972).

perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.[50] In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals [457 U.S. 222]of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society."[51] Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality

[50] *Ambach* v. *Norwick*, p. 192.

[51] *Wisconsin* v. *Yoder*, p. 221.

embodied in the Equal Protection Clause.[52] What we said 28 years ago, in *Brown v. Board of Education*[53] still holds true:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[54] B

These well-settled principles allow us to determine the proper level of deference to be afforded 21.031. Undocumented aliens cannot be treated as a suspect class, because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its

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[52] [Because the State does not afford noncitizens the right to vote, and may bar noncitizens from participating in activities at the heart of its political community, appellants argue that denial of a basic education to these children is of less significance than the denial to some other group. Whatever the current status of these children, the courts below concluded that many will remain here permanently, and that some indeterminate number will eventually become citizens. The fact that many will not is not decisive, even with respect to the importance of education to participation in core political institutions. "[T]he benefits of education are not reserved to those whose productive utilization of them is a certainty. . . ." 458 F.Supp. p. 581, n. 14. In addition, although a noncitizen may be barred from full involvement in the political arena, he may play a role -- perhaps even a leadership role -- in other areas of import to the community. Nyquist v. Mauclet, 432 U.S. 1, 12 (1977). Moreover, the significance of education to our society is not limited to its political and cultural fruits. The public schools are an important socializing institution, imparting those shared values through which social order and stability are maintained.

[53] 347 U.S. 483 (1954). Ed.]

[54] 457 U.S. 493

population.[55] But more is involved in these cases than the abstract question whether 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining [457 U.S. 224] the rationality of 21. 031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in 21.031 can hardly be considered rational unless it furthers some substantial goal of the State. IV

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children vel non establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. The State notes that, while other aliens are admitted "on an equality of legal privileges with all citizens under nondiscriminatory laws,"[56] the asserted right of these children to an education can claim no implicit congressional imprimatur.[57] Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the

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[55] *San Antonio Independent School District v. Rodriguez*, pp. 28-39.

[56] *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420 (1948).

[57] [If the constitutional guarantee of equal protection was available only to those upon whom Congress affirmatively granted its benefit, the state's argument would be virtually unanswerable. But the Equal Protection Clause operates of its own force to protect anyone "within [the State's] jurisdiction" from the State's arbitrary action. See Part II. The question we examine in text is whether the federal disapproval of the presence of these children assists the State in overcoming the presumption that denial of education to innocent children is not a rational response to legitimate state concerns. Ed.]

United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education.[58]

The Constitution grants Congress the power to "establish an uniform Rule of Naturalization."[59] Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders.[60] The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.[61] But this traditional caution does not persuade us that deference must be shown the classification embodied in 21.031. The States enjoy no power with respect to the classification of aliens.[62] This power is "committed to the political branches of the Federal government."[63]

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[58] 457 U.S. 225.

[59] Art. I., 8, cl. 4.

[60] *Mathews* v. *Diaz*, 426 U.S. 67 (1976); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952).

[61] *Mathews*, p. 204.

[62] *Hines v. Davidowitz*, 312 U.S. 52 (1941).

[63] *Mathews*, 426 U.S. p. 166.

Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status, and to "take into account the character of the relationship between the alien and this country," only rarely are such matters relevant to legislation by a State.[64]

As we recognized in *De Canas v. Bica*,[65] the States do have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal. In *De Canas*, the State's program reflected Congress' intention to bar from employment all aliens except those possessing a grant of permission to work in this country.[66] In contrast, there is no indication that the disability imposed by 21.031 corresponds to any identifiable congressional policy. The State does not claim that the conservation of state educational resources was ever a congressional concern in restricting immigration. More importantly, the classification reflected in 21.031 does not operate harmoniously within the federal program.[67]

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation.[68] But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. [69] In light of the discretionary federal power to grant relief from deportation, a State cannot realistically

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[64] Ibid., pp. 84-85; *Nyquist v. Mauclet*, 432 U.S. 1, 7, n. 8 (1977).

[65] 424 U.S. 351 (1976).

[66] Ibid., p. 361.

[67] 457 p. 226.

[68] 8 U.S.C. 1251, 1252 (1976 ed. and Supp. IV).

determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would, of course, be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to "the purposes for which the state desires to use it."[70] We therefore turn to the state objectives that are said to support 21.031.[71] V

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents."[72]

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[69] 8 U.S.C. 1252, 1253(h), 1254 (1976 ed. and Supp. IV).

[70] *Oyama v. California*, 332 U.S. 633, 664-665 (1948) (Murphy, J., concurring) (emphasis added).

[71] 457 U.S. 227.

[72] [Appellant School District sought at oral argument to characterize the alienage classification contained in 21.031 as simply a test of residence. We are unable to uphold 21.031 on that basis. Appellants conceded that, if, for example, a Virginian or a legally admitted Mexican citizen entered Tyler with his school-age children, intending to remain only six months, those children would be viewed as residents entitled to attend Tyler schools. Tr. of Oral Arg. 31-32. It is thus clear that Tyler's residence argument amounts to

Of course, a concern for the preservation of resources, standing alone, can hardly justify the classification used in allocating those resources.[73] The State must do more than justify its classification with a concise expression of an intention to discriminate.[74] Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status -- an asserted prerogative that carries only minimal force in the circumstances of these cases -- we discern three colorable state interests that might support 21.031. [457 U.S. 228]

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population,[75] 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens under utilize public services, while contributing their labor to the local economy

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nothing more than the assertion that illegal entry, without more, prevents a person from becoming a resident for purposes of enrolling his children in the public schools. A State may not, however, accomplish what the Equal Protection Clause would otherwise prohibit merely by defining a disfavored group as nonresident. And illegal entry into the country would not, under traditional criteria, bar a person from obtaining domicile within a State. *C. Bouve*, Exclusion and Expulsion of Aliens in the United States 340 (1912). Appellants have not shown that the families of undocumented children do not comply with the established standards by which the State historically tests residence. Apart from the alienage limitation, 21.031(b) requires a school district to provide education only to resident children. The school districts of the State are as free to apply to undocumented children established criteria for determining residence as they are to apply those criteria to any other child who seeks admission. Ed.]

[73] *Graham v. Richardson*, 403 U.S. 365, (1971).

[74] *Board v. Flores de Otero*, 426 U.S. 572, 605 (1976).

[75] [Although the State has no direct interest in controlling entry into this country, that interest being one reserved by the Constitution to the Federal Government, unchecked unlawful migration might impair the State's economy generally, or the State's ability to provide some important service. Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns. Ed.] See *De Canas v. Bica*, 424 U.S. p. 454.

and tax money to the state fisc.[76] The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education.[77] Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that "charging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of [457 U.S. 229] prohibiting the employment of illegal aliens.[78]

Second, while it is apparent that a State may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools,"[79] appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State.[80] As the District Court in No. 801934 noted, the state failed to offer any credible supporting evidence that a proportionately small diminution of the funds spent on each

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[76] 458 F.Supp. p. 578; 501 F.Supp. pp. 570-571.

[77] [The courts below noted the ineffectiveness of the Texas provision as a means of controlling the influx of illegal entrants into the State. See 628 F.2d pp. 460-461; 458 F.Supp. p. 585; 501 F.Supp. p. 578 ("The evidence demonstrates that undocumented persons do not immigrate in search for a free public education. Virtually all of the undocumented persons who come into this country seek employment opportunities, and not educational benefits. . . . There was overwhelming evidence . . . of the unimportance of public education as a stimulus for immigration."). Ed.]

[78] 458 F.Supp. p. 585. See 628 F.2d p. 461; 501 F.Supp. p. 579, and n. 88.

[79] *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

[80] Ibid., pp. 579-581. [Nor does the record support the claim that the educational resources of the State are so direly limited that some form of "educational triage" might be deemed a reasonable (assuming that it were a permissible) response to the State's problems. Ed.]

child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education.[81] And, after reviewing the State's school financing mechanism, the District Court in No. 80-1538 concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools.[82] Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children.[83]

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State,[84] and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the

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[81] 501 F.Supp. p. 583.

[82] 458 F.Supp. p. 577.

[83] Ibid., p. 589; 501 F.Supp. p. 583, and n. 104.

[84] 457 U.S. 230

creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is Affirmed. MARSHALL, J., concurring

JUSTICE MARSHALL, concurring.

While I join the Court opinion, I do so without in any way retreating from my opinion in San Antonio Independent School District *v. Rodriguez*, (dissenting opinion). I continue to believe that an individual's interest in education is fundamental, and that this view is amply supported by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.[85]

Furthermore, I believe that the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the

[85] 457 U.S. 231

basis upon which the particular classification is drawn.[86] It continues to be my view that a class-based denial of public education is utterly incompatible with the Equal Protection Clause of the Fourteenth Amendment. BLACKMUN, J., concurring

JUSTICE BLACKMUN, concurring.

I join the opinion and judgment of the Court.

Like JUSTICE POWELL, I believe that the children involved in this litigation "should not be left on the streets uneducated."[87] I write separately, however, because, in my view, the nature of the interest at stake is crucial to the proper resolution of these cases.

The "fundamental rights" aspect of the Court's equal protection analysis -- the now-familiar concept that governmental classifications bearing on certain interests must be closely scrutinized -- has been the subject of some controversy. Justice Harlan, for example, warned that virtually every state statute affects important rights. . . . To extend the "compelling interest" rule to all cases in which such rights are affected would go far toward making this Court a "superlegislature."[88] Others have noted that strict scrutiny under the Equal Protection Clause is unnecessary when classifications infringing enumerated constitutional rights are involved, for a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any

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[86] Ibid., p. 99. See also *Dandridge v. Williams*, 397 U.S. 471, (1970) (MARSHALL, J., dissenting).

[87] Inf. p. 238.

[88] *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (dissenting opinion).

classifications.[89] Still others have suggested that fundamental rights are not properly a part of equal protection analysis at all, because they are unrelated to any defined principle of equality.[90]

These considerations, combined with doubts about the judiciary's ability to make fine distinctions in assessing the effects of complex social policies, led the Court in *Rodriguez* to articulate a firm rule: fundamental rights are those that "explicitly or implicitly [are] guaranteed by the Constitution."[91] It therefore squarely rejected the notion that "an ad hoc determination as to the social or economic importance" of a given interest is relevant to the level of scrutiny accorded classifications involving that interest, and made clear that "it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[92]

I joined JUSTICE POWELL's opinion for the Court in *Rodriguez*, and I continue to believe that it provides the appropriate model for resolving most equal protection disputes. Classifications infringing substantive constitutional rights necessarily will be invalid, if not by force of the Equal Protection Clause, then through operation of other provisions of the Constitution. Conversely, classifications bearing on nonconstitutional interests -- even those involving "the most basic economic needs of impoverished human beings,"[93] -- generally are not subject to special treatment under the Equal Protection

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[89] *San Antonio Independent School District v. Rodriguez*,411 U.S. 1, 61 (1973) (Stewart, J., concurring). See *Shapiro v. Thompson*, 394 U.S. p. 659 (Harlan, J., dissenting).

[90] *Perry, Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum.L.Rev. pp.1023, 1075-1083 (1979).

[91] 411 U.S. pp. 33-34.

[92] Ibid., pp. 32-33.

[93] *Dandridge v. Williams*, 397 U.S. 471, p. 485 (1970).

Clause, because they are not distinguishable in any relevant way from other regulations in "the area of economics and social welfare."[94]

With all this said, however, I believe the Court's experience has demonstrated that the *Rodriguez* formulation does not settle every issue of "fundamental rights" arising under the Equal Protection Clause.[95] Only a pedant would insist that there are no meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis. Thus, the Court's decisions long have accorded strict scrutiny to classifications bearing on the right to vote in state elections, and *Rodriguez* confirmed the "constitutional underpinnings of the right to equal treatment in the voting process."[96] Yet "the right to vote, per se, is not a constitutionally protected right,"[97] Instead, regulation of the electoral process receives unusual scrutiny because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."[98] In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a citizen cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the

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[94] Ibid.,

[95] 457 U.S. 233

[96] 411 U.S. p. 34, n. 74.

[97] Ibid., p. 35, n. 78. See *Harper v. Virginia Board of Elections*, 383 U.S. 663, 665 (1966); *Rodriguez*, 411 U.S. p. 59, n. 2 (Stewart, J., concurring).

[98] *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). See *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

political process. Those denied the vote are relegated, by state fiat, in a most basic way to second-class status.[99]

It is arguable, of course, that the Court never should have applied fundamental rights doctrine in the fashion outlined above. Justice Harlan, for one, maintained that strict equal protection scrutiny was appropriate only when racial or analogous classifications were at issue.[100] But it is too late to debate that point, and I believe that accepting the principle of the voting cases -- the idea that state classifications bearing on certain interests pose the risk of allocating rights in a fashion inherently contrary to any notion of "equality" -- dictates the outcome here. As both JUSTICE POWELL and THE CHIEF JUSTICE observe, the Texas scheme inevitably will create "a subclass of illiterate persons,"[101] where I differ with THE CHIEF JUSTICE is in my conclusion that this makes the statutory scheme unconstitutional, as well as unwise.[102]

In my view, when the State provides an education to some and denies it to others, it immediately and inevitably creates class distinctions of a type fundamentally inconsistent with those purposes, mentioned above, of the Equal Protection Clause. Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And

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[99] [I use the term "citizen" advisedly. The right to vote, of course, is a political interest of concern to citizens. The right to an education, in contrast, is a social benefit of relevance to a substantial number of those affected by Texas' statutory scheme, as is discussed below.]

[100] *Shapiro v. Thompson*, 394 U.S. at (dissenting opinion). See *Reynolds v. Sims*, 377 U.S. at (Harlan, J., dissenting).

[101] Inf. p. 241 (POWELL, J., concurring); see *infra* p. 242, 254 (BURGER, C.J., dissenting).

[102] . [The Court concludes that the provision at issue must be invalidated "unless it furthers some substantial goal of the State." Ibid., p. 224. Since the statute fails to survive this level of scrutiny, as the Court demonstrates, there is no need to determine whether a more probing level of review would be appropriate.]

when those children are members of an identifiable group, that group -- through the State's action -- will have been converted into a discrete underclass. Other benefits provided by the State, such as housing and public assistance, are, of course, important; to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are, in a sense, unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. [103]In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage. [104]

This conclusion is fully consistent with *Rodriguez*. The Court there reserved judgment on the constitutionality of a state system that "occasioned an absolute denial of educational opportunities to any of its children," noting that no charge fairly could be made that the system [at issue in *Rodriguez*] fails to provide each child with an opportunity to acquire . . . basic minimal skills.[105] And it cautioned that, in a case involv[ing] the most persistent and difficult questions of educational policy, . . . [the] Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels.[106] Thus *Rodriguez* held, and the Court now reaffirms, that "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."

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[103] Cf. *Rodriguez*, 411 U.S. p. 115, n. 74 (MARSHALL, J., dissenting).

[104] 457 U.S. 235.

[105] Cf. *Rodriguez*, 411 U.S. p. 37.

[106] Ibid., p. 42.

[107] Similarly, it is undeniable that education is not a "fundamental right" in the sense that it is constitutionally guaranteed. Here, however, the State has undertaken to provide an education to most of the children residing within its borders. And, in contrast to the situation in *Rodriguez*, it does not take an advanced degree to predict the effects of a complete denial of education upon those children targeted by the State's classification. In such circumstances, the voting decisions suggest that the State must offer something more than a rational basis for its classification.

Concededly, it would seem ironic to discuss the social necessity of an education in a case that concerned only undocumented aliens "whose very presence in the state and this country is illegal."[108] But because of the nature of the federal immigration laws and the preeminent role of the Federal Government in[109] regulating immigration, the class of children here is not a monolithic one. Thus, the District Court in the *Alien Children Education* case found as a factual matter that a significant number of illegal aliens will remain in this country permanently,[110] that some of the children involved in this litigation are "documentable,"[111] and that "[m]any of the undocumented children are not deportable. None of the named plaintiffs is under an order of deportation."[112] As the Court's alienage cases demonstrate, these children may not be denied rights that are

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[107] Ibid., p. 223.

[108] Inf. p. 250 (BURGER, C.J., dissenting).

[109] [457 U.S. 236]

[110] 501 F.Supp. 544, 558-559 (SD Tex.1980).

[111] Ibid., p. 573.

[112] Ibid., p. 583, n. 103.

granted to citizens, excepting only those rights bearing on political interests.[113] And, as JUSTICE POWELL notes, the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported.[114] Indeed, any attempt to do so would involve the State in the administration of the immigration laws. Whatever the State's power to classify deportable aliens, then -- and whatever the Federal Government's ability to draw more precise and more acceptable alienage classifications -- the statute at issue here sweeps within it a substantial number of children who will in fact, and who may well be entitled to, remain in the United States. Given the extraordinary nature of the interest involved, this makes the classification here fatally imprecise. And, as the Court demonstrates, the Texas legislation is not otherwise supported by any substantial interests.

Because I believe that the Court's carefully worded analysis recognizes the importance of the equal protection and preemption interests I consider crucial, I join its opinion as well as its judgment. POWELL, J., concurring.

JUSTICE POWELL, concurring.

I join the opinion of the Court, and write separately to emphasize the unique character of the cases before us.[115] The classification in question severely disadvantages children who are the victims of a combination of circumstances. Access from Mexico into this country, across our 2,000-mile border, is readily available and virtually uncontrollable. Illegal aliens are attracted by our employment opportunities, and perhaps

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[113] *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

[114] Inf. p. n. 6.

[115] [457 U.S. 237]

by other benefits as well. This is a problem of serious national proportions, as the Attorney General recently has recognized.[116] Perhaps because of the intractability of the problem, Congress -- vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens -- has not provided effective leadership in dealing with this problem. It is certain that illegal aliens will continue to enter the United States and, as the record makes clear, an unknown percentage of them will remain here.[117] I agree with the Court that their children should not be left on the streets uneducated.

Although the analogy is not perfect, our holding today does find support in decisions of this Court with respect to the status of illegitimates. In *Weber v. Aetna Casualty & Surety Co.*,[118] we said: "[V]isiting . . . condemnation on the head of an infant" for the misdeeds of the parents is illogical, unjust, and "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."

In these cases, the State of Texas effectively denies to the school-age children of illegal aliens the opportunity to attend the free public schools that the State makes available to all residents. They are excluded only because of a status resulting from the violation by parents or guardians of our immigration laws and the fact that they remain in

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[116] Ibid., p. n. 17.

[117] [457 U.S. 238]

[118] 406 U.S. 164, 175 (1972).

our country unlawfully.[119] The appellee children are innocent in this respect. They can "affect neither their parents' conduct nor their own status."[120]

Our review in a case such as these is properly heightened.[121] The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents.[122] These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.[123] In these unique circumstances, the Court properly may

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[119] [Article I, 8, cl. 4, of the Constitution provides: "The Congress shall have Power . . . To establish an uniform Rule of Naturalization." The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948). See Graham v. Richardson, 403 U.S. 365, 378 (1971) (regulation of aliens is "constitutionally entrusted to the Federal Government.").
The Court has traditionally shown great deference to federal authority over immigration and to federal classifications based upon alienage. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("it is important to underscore the limited scope of judicial inquiry into immigration legislation"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"). Indeed, even equal protection analysis in this area is based to a large extent on an underlying theme of preemption and exclusive federal power over immigration. See *Takahashi v. Fish & Game Commission*, p. 420 (the Federal Government has admitted resident aliens to the country "on an equality of legal privileges with all citizens under nondiscriminatory laws," and the States may not alter the terms of this admission). Compare *Graham v. Richardson*, and *Sugarman v. Dougall*, 413 U.S. 634 (1973), with *Mathews v.* Diaz, 426 U.S. 67 (1976), and *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). Given that the States' power to regulate in this area is so limited, and that this is an area of such peculiarly strong federal authority, the necessity of federal leadership seems evident.]

[120] *Trimble v. Gordon*, 430 U.S. 762, 770 (1977).

[121] Ibid., p. 767. Cf. *Craig v. Boren*, 429 U.S. 190 (1976).

[122] [457 U.S. 239]

[123] [I emphasize the Court's conclusion that strict scrutiny is not appropriately applied to this classification. This exacting standard of review has been reserved for instances in which a "fundamental" constitutional right or a "suspect" classification is present. Neither is present in these cases, as the Court holds.]

require that the State's interests be substantial and that the means bear a "fair and substantial relation" to these interests.[124]

In my view, the State's denial of education to these children bears no substantial relation to any substantial state interest. Both of the District Courts found that an uncertain but significant percentage of illegal alien children will remain in Texas as residents, and many eventually will become citizens. The discussion by the Court of the State's purported interests demonstrates that they are poorly served by the educational exclusion.[125] Indeed, the interests relied upon by the State would seem to be insubstantial in view of the consequences to the State itself of wholly uneducated persons living indefinitely within its borders. By contrast, access to the public schools is made available to the children of lawful residents without regard to the temporary nature of their residency in the particular Texas school district.[126] The Court of Appeals and the District Courts that addressed these cases concluded that the classification could not satisfy even the bare requirements of rationality.[127] One need not go so far to conclude that the

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[124] *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) ("classifications based on illegitimacy . . . are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests") Ibid., p. 271 ("as the State's interests are substantial, we now consider the means adopted").

[125] [THE CHIEF JUSTICE argues in his dissenting opinion that this heightened standard of review is inconsistent with the Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973). But in Rodriguez, no group of children was singled out by the State and then penalized because of their parents' status. Rather, funding for education varied across the State because of the tradition of local control. Nor, in that case, was any group of children totally deprived of all education, as in these cases. If the resident children of illegal aliens were denied welfare assistance, made available by government to all other children who qualify, this also -- in my opinion -- would be an impermissible penalizing of children because of their parents' status.]

[126] [457 U.S. 240]

[127] [The State provides free public education to all lawful residents whether they intend to reside permanently in the State or only reside in the State temporarily. p. 227, n. 22. Of course, a school district may require that illegal alien children, like any other children, actually reside in the school district before admitting them to the schools. A requirement of de facto residency, uniformly applied, would not violate any principle of equal protection.]

exclusion of appellees' class of children from state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.[128]

In reaching this conclusion, I am not unmindful of what must be the exasperation of responsible citizens and government authorities in Texas and other States similarly situated. Their responsibility, if any, for the influx of aliens is slight compared to that imposed by the Constitution on the Federal Government. So long as the ease of entry remains inviting,[129] and the power to deport is exercised infrequently by the Federal Government, the additional expense of admitting these children to public schools might fairly be shared by the Federal and State Governments.[130] But it hardly can be argued

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[128] [The classes certified in these cases included all undocumented school-age children of Mexican origin residing in the school district, p. 206, or the State. See In re Alien Children Education Litigation, 501 F.Supp. 544, 553 (SD Tex.1980). Even so, it is clear that neither class was thought to include mature Mexican minors who were solely responsible for violating the immigration laws. In 458 F.Supp. 569 (ED Tex.1978), the court characterized plaintiffs as "entire families who have migrated illegally." Ibid., p. 578. A parent or guardian represented each of the plaintiff children in that case. Similarly, the court in In re Alien Children Education Litigation found that "undocumented children do not enter the United States unaccompanied by their parents." 501 F.Supp. p. 573. A different case would be presented in the unlikely event that a minor, old enough to be responsible for illegal entry and yet still of school age, entered this country illegally on his own volition.]

[129] [457 U.S. 241]

[130] [In addition, the States' ability to respond on their own to the problems caused by this migration may be limited by the principles of preemption that apply in this area. See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1941). In De Canas v. Bica, 424 U.S. 351 (1976), the Court found that a state law making it a criminal offense to employ illegal aliens was not preempted by federal authority over aliens and immigration. The Court found evidence that Congress intended state regulation in this area. Ibid., p. 361 ("there is evidence . . . that Congress intends that States may, to the extent consistent with federal law, regulate the employment of illegal aliens"). Moreover, under federal immigration law, only immigrant aliens and nonimmigrant aliens with special permission are entitled to work. See 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure, 1.34a, 1.36, 2.6b (1981).
Because federal law clearly indicates that only certain specified aliens may lawfully work in the country, and because these aliens have documentation establishing this right, the State in De Canas was able to identify with certainty which aliens had a federal permission to work in this country. The State did not need to concern itself with an alien's current or future deportability. By contrast, there is no comparable federal guidance in the area of education. No federal law invites state regulation; no federal regulations identify those aliens who have a right to attend public schools. In addition, the Texas educational exclusion requires the State to make predictions as to whether individual aliens eventually will be found to be deportable. But it is impossible for a State to determine which aliens the Federal Government will eventually deport, which the Federal Government will permit to stay, and which the Federal Government

rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons, many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime.[131] BURGER, J., dissenting.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and
JUSTICE O'CONNOR join, dissenting.

Were it our business to set the Nation's social policy, I would agree without hesitation that it is senseless for an enlightened society to deprive any children -- including illegal aliens -- of an elementary education. I fully agree that it would be folly -- and wrong -- to tolerate creation of a segment of society made up of illiterate persons, many having a limited or no command of our language. However, the Constitution does not constitute us as "Platonic Guardians," nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, "wisdom," or "common sense."[132] We trespass on the assigned function of the political branches under our structure of limited and separated powers when we assume a policy-making role as the Court does today.

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will ultimately naturalize. Until an undocumented alien is ordered deported by the Federal Government, no State can be assured that the alien will not be found to have a federal permission to reside in the country, perhaps even as a citizen. Indeed, even the Immigration and Naturalization Service cannot predict with certainty whether any individual alien has a right to reside in the country until deportation proceedings have run their course. See, e.g., 8 U.S.C. 1252, 1253(h), 1254 (1976 ed. and Supp. IV).]

[131] [457 U.S. 242]

[132] *TVA v. Hill*, 437 U.S. 153, (1978).

The Court makes no attempt to disguise that it is acting to make up for Congress' lack of "effective leadership" in dealing with the serious national problems caused by the influx of uncountable millions of illegal aliens across our borders.[133] The failure of enforcement of the immigration laws over more than a decade and the inherent difficulty and expense of sealing our vast borders have combined to create a grave socioeconomic dilemma. It is a dilemma that has not yet even been fully assessed, let alone addressed. However, it is not the function of the Judiciary to provide "effective leadership" simply because the political branches of government fail to do so.

The Court's holding today manifests the justly criticized judicial tendency to attempt speedy and wholesale formulation of "remedies" for the failures -- or simply the laggard pace -- of the political processes of our system of government. The Court employs, and, in my view, abuses, the Fourteenth Amendment in an effort to become an omnipotent and omniscient problem solver. That the motives for doing so are noble and compassionate does not alter the fact that the Court distorts our constitutional function to make amends for the defaults of others.

In a sense, the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases. Yet the extent to which the Court departs from principled constitutional adjudication is nonetheless disturbing.

I have no quarrel with the conclusion that the Equal Protection Clause of the Fourteenth Amendment applies to aliens who, after their illegal entry into this country, are indeed physically "within the jurisdiction" of a state. However, as the Court

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[133] [457 U.S. 243] (POWELL, J., concurring).

concedes, this "only begins the inquiry."[134] The Equal Protection Clause does not mandate identical treatment of different categories of persons.[135] The dispositive issue in these cases, simply put, is whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there.[136] The distinction the State of Texas has drawn -- based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies -- is not unconstitutional. A

The Court acknowledges that, except in those cases when state classifications disadvantage a "suspect class" or impinge upon a "fundamental right," the Equal Protection Clause permits a state "substantial latitude" in distinguishing between different groups of persons. Moreover, the Court expressly -- and correctly -- rejects any suggestion that illegal aliens are a suspect class,[137] or that education is a fundamental right.[138] Yet by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.

In the end, we are told little more than that the level of scrutiny employed to strike down the Texas law applies only when illegal alien children are deprived of a public

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[134] Ibid., p. 215.

[135] *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Reed v. Reed*, 404 U.S. 71, 75 (1971); *Tigner v. Texas*, 310 U.S. 141, 147-148 (1940).

[136] [457 U.S. 244]

[137] Ibid., p. 219, n.19.

[138] Ibid., p. 221, 223.

education. If ever a court was guilty of an unabashedly result-oriented approach, this case is a prime example.[139] (1)

The Court first suggests that these illegal alien children, although not a suspect class, are entitled to special solicitude under the Equal Protection Clause because they lack "control" over or "responsibility" for their unlawful entry into this country.[140] Similarly, the Court appears to take the position that 21.031 is presumptively "irrational" because it has the effect of imposing "penalties" [457 U.S. 245] on "innocent" children.[141] However, the Equal Protection Clause does not preclude legislators from classifying among persons on the basis of factors and characteristics over which individuals may be said to lack "control." Indeed, in some circumstances, persons generally, and children in particular, may have little control over or responsibility for such things as their ill health, need for public assistance, or place of residence. Yet a state legislature is not barred from considering, for example, relevant differences between the mentally healthy and the mentally ill, or between the residents of different counties simply because these may be factors unrelated to individual choice or to any "wrongdoing." The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and

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[139] [It does not follow, however, that a state should bear the costs of educating children whose illegal presence in this country results from the default of the political branches of the Federal Government. A state has no power to prevent unlawful immigration, and no power to deport illegal aliens; those powers are reserved exclusively to Congress and the Executive. If the Federal Government, properly chargeable with deporting illegal aliens, fails to do so, it should bear the burdens of their presence here. Surely if illegal alien children can be identified for purposes of this litigation, their parents can be identified for purposes of prompt deportation.]

[140] Ibid., p. 220.

[141] Ibid., (POWELL, J., concurring).

hostility; it is not an all-encompassing "equalizer" designed to eradicate every distinction for which persons are not "responsible." [457 U.S. 246]

The Court does not presume to suggest that appellees' purported lack of culpability for their illegal status prevents them from being deported or otherwise "penalized" under federal law. Yet would deportation be any less a "penalty" than denial of privileges provided to legal residents? Illegality of presence in the United States does not -- and need not -- depend on some amorphous concept of "guilt" or "innocence' concerning an alien's entry. Similarly, a state's use of federal immigration status as a basis for legislative classification is not necessarily rendered suspect for its failure to take such factors into account.

The Court's analogy to cases involving discrimination against illegitimate children --- is grossly misleading.[142] The State has not thrust any disabilities upon appellees due to their "status of birth."[143] Rather, appellees' status is predicated upon the circumstances of their concededly illegal presence in this country, and is a direct result of Congress' obviously valid exercise of its "broad constitutional powers" in the field of immigration and naturalization.[144] This Court has recognized that, in allocating governmental benefits to a given class of aliens, one "may take into account the character of the relationship between the alien and this country."[145] When that "relationship" is a federally prohibited

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[142] Ibid., p. 220; (POWELL, J., concurring).

[143] Cf. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 176 (1972).

[144] U.S.Const., Art. I, 8, Cl. 4; see *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948).

[145] *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976).

one, there can, of course, be no presumption that a state has a constitutional duty to include illegal aliens among the recipients of its governmental benefits. [457 U.S. 247][146]

The second strand of the Court's analysis rests on the premise that, although public education is not a constitutionally guaranteed right, "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation."[147] Whatever meaning or relevance this opaque observation might have in some other context it simply has no bearing on the issues at hand. Indeed, it is never made clear what the Court's opinion means on this score.

The importance of education is beyond dispute. Yet we have held repeatedly that the importance of a governmental service does not elevate it to the status of a "fundamental right" for purposes of equal protection analysis.[148] In San Antonio Independent School District, JUSTICE POWELL, speaking for the Court, expressly rejected the proposition that state laws dealing with public education are subject to special scrutiny under the Equal Protection Clause. Moreover, the Court points to no meaningful way to distinguish between education and other governmental benefits [457 U.S. 248] in this context. Is the Court suggesting that education is more "fundamental' than food, shelter, or medical care?

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[146] [The Department of Justice recently estimated the number of illegal aliens within the United States at between 3 and 6 million. Joint Hearing before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Subcommittee on Immigration and Refugee Policy of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., 7 (1981) (testimony of Attorney General Smith). Other estimates run as high as 12 million. See Strout, Closing the Door on Immigration, Christian Science Monitor, May 21, 1982, p. 22, col. 4.]

[147] Ibid., p. 221.

[148] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 301 (1973); *Lindsey v. Normet*, 405 U.S. 56, 73-74 (1972).

The Equal Protection Clause guarantees similar treatment of similarly situated persons, but it does not mandate a constitutional hierarchy of governmental services. JUSTICE POWELL, speaking for the Court in *San Antonio Independent School District*,[149] put it well in stating that, to the extent this Court raises or lowers the degree of "judicial scrutiny" in equal protection cases according to a transient Court majority's view of the societal importance of the interest affected, we "assume a legislative role, and one for which the Court lacks both authority and competence.' [150] Yet that is precisely what the Court does today.[151]

The central question in these cases, as in every equal protection case not involving truly fundamental rights "explicitly or implicitly guaranteed by the Constitution,"[152] is whether there is some legitimate basis for a legislative distinction between different classes of persons. The fact that the distinction is drawn in legislation affecting access to public education -- as opposed to legislation allocating other important governmental benefits, such as public assistance, health care, or housing -- cannot make a difference in the level of scrutiny applied.[153] B

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[149] Ibid.,, p. 31.

[150] [The Court implies, for example, that the Fourteenth Amendment would not require a state to provide welfare benefits to illegal aliens.]

[151] *Shapiro v. Thompson*, 394 U.S. 618, (1969) (Harlan, J., dissenting).

[152] *San Antonio Independent School District*, pp. 33-34.

[153] [Both the opinion of the Court and JUSTICE POWELL's concurrence imply that appellees are being "penalized" because their parents are illegal entrants. Ibid., p. 220; p. 239, n. 3 (POWELL, J., concurring). However, Texas has classified appellees on the basis of their own illegal status, not that of their parents. Children born in this country to illegal alien parents, including some of appellees' siblings, are not excluded from the Texas schools. Nor does Texas discriminate against appellees because of their Mexican origin or citizenship. Texas provides a free public education to countless thousands of Mexican immigrants who are lawfully in this country.]

Once it is conceded -- as the Court does -- that illegal aliens are not a suspect class, and that education is not a fundamental right, our inquiry should focus on and be limited to whether the legislative classification at issue bears a rational relationship to a legitimate state purpose.[154] [457 U.S. 249]

The State contends primarily that 21.031 serves to prevent undue depletion of its limited revenues available for education, and to preserve the fiscal integrity of the State's school-financing system against an ever-increasing flood of illegal aliens -- aliens over whose entry or continued presence it has no control. Of course such fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons. Yet I assume no Member of this Court would argue that prudent conservation of finite state revenues is, per se, an illegitimate goal. Indeed, the numerous classifications this Court has sustained in social welfare legislation were invariably related to the limited amount of revenues available to spend on any given program or set of programs.[155] The significant question here is whether the requirement of tuition from illegal aliens who attend the public schools -- as well as from residents of other states,[156] for example -- is a rational and reasonable means of furthering the state's legitimate fiscal ends.[157] [457 U.S. 250]

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[154] *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Dandridge v. Williams*, 397 U.S. 471, (1970); p. 216.

[155] *Jefferson v. Hackney*, 406 U.S. *Dandridge v. Williams*, p. 487.

[156] [Appellees "lack control" over their illegal residence in this country in the same sense as lawfully resident children lack control over the school district in which their parents reside. Yet in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), we declined to review under 'heightened scrutiny" a claim that a State discriminated against residents of less wealthy school districts in its provision of educational benefits. There was no suggestion in that case that a child's 'lack of responsibility' for his residence in a particular school district had any relevance to the proper standard of review of his claims. The result was that children lawfully here but residing in different counties received different treatment.]

[157] [The Texas law might also be justified as a means of deterring unlawful immigration. While regulation of immigration is an exclusively federal function, a state may take steps, consistent with federal

Without laboring what will undoubtedly seem obvious to many, it simply is not "irrational" for a state to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the state and this country is illegal as it does to provide for persons lawfully present. By definition, illegal aliens have no right whatever to be here, and the state may reasonably, and constitutionally, elect not to provide them with governmental services at the expense of those who are lawfully in the state.[158] In *De Canas v. Bica*,[159] we held that a State may protect its fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens. And, only recently, this Court made clear that a State has a legitimate interest in protecting and preserving the quality of its schools and "the right of its own bona fide residents to attend such institutions on a preferential tuition

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immigration policy, to protect its economy and ability to provide governmental services from the "deleterious effects" of a massive influx of illegal immigrants. De Canas v. Bica, 424 U.S. 351 (1976); p. 228, n. 23. The Court maintains that denying illegal aliens a free public education is an "ineffectual" means of deterring unlawful immigration, at least when compared to a prohibition against the employment of illegal aliens. Perhaps that is correct, but it is not dispositive; the Equal Protection Clause does not mandate that a state choose either the most effective and all-encompassing means of addressing a problem or none at all. Dandridge v. Wiliams, 397 U.S. 471, 1970). Texas might rationally conclude that more significant "demographic or economic problem[s]," p. 228, are engendered by the illegal entry into the State of entire families of aliens for indefinite periods than by the periodic sojourns of single adults who intend to leave the State after short-term or seasonal employment. It blinks reality to maintain that the availability of governmental services such as education plays no role in an alien family's decision to enter, or remain in, this country; certainly, the availability of a free bilingual public education might well influence an alien to bring his children, rather than travel alone for better job opportunities.]

[158] . [The Court suggests that the State's classification is improper because "[a]n illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen." p. 226. However, once an illegal alien is given federal permission to remain, he is no longer subject to exclusion from the tuition-free public schools under 21.031. The Court acknowledges that the Tyler Independent School District provides a free public education to any alien who has obtained, or is in the process of obtaining, documentation from the United States Immigration and Naturalization Service. p. 206, n. 2. Thus, Texas has not taken it upon itself to determine which aliens are or are not entitled to United States residence. JUSTICE BLACKMUN's assertion that the Texas statute will be applied to aliens "who may well be entitled to . . . remain in the United States," p. 236 (concurring opinion), is wholly without foundation.]

[159] 424 U.S. 351, 357 (1976).

basis."[160] The Court has failed to offer even a plausible explanation why illegality of residence [457 U.S. 251] in this country is not a factor that may legitimately bear upon the bona fides of state residence and entitlement to the benefits of lawful residence.[161]

It is significant that the Federal Government has seen fit to exclude illegal aliens from numerous social welfare programs, such as the food stamp program,[162] the old-age assistance, aid to families with dependent children, aid to the blind, aid to the permanently and totally disabled, and supplemental security income programs[163] the Medicare hospital insurance benefits program,[164] and the Medicaid hospital insurance benefits for the aged and disabled program.[165] Although these exclusions do not conclusively demonstrate the constitutionality of the State's use of the same classification for comparable purposes, at the very least they tend to support the rationality of

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[160] *Vlandis v. Kline, 412 U.S. 441, 453 (1973) (emphasis added). See also Elkins* v. Moreno, 435 U.S. 647, (1978).

[161] [The Court's opinion is disingenuous when it suggests that the State has merely picked a "disfavored group" and arbitrarily defined its members as nonresidents. p. 227, n. 22. Appellees' "disfavored status' stems from the very fact that federal law explicitly prohibits them from being in this country. Moreover, the analogies to Virginians or legally admitted Mexican citizens entering Texas, Ibid., are spurious. A Virginian's right to migrate to Texas, without penalty, is protected by the Constitution, see, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969); and a lawfully admitted alien's right to enter the State is likewise protected by federal law. See *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). Cf. *Zobel v. Williams*]

[162] 7 U.S.C. 2015(f) (1976 ed. and Supp. IV) and 7 CFR 273.4 (1981).

[163] 45 CFR 233.50 (1981).

[164] 42 U.S.C. 1395i-2 and 42 CFR 405.205(b) (1981).

[165] 42 U.S.C. 1395o and 42 CFR 405.103(a)(4) (1981). [It is true that the Constitution imposes lesser constraints on the Federal Government than on the states with regard to discrimination against lawfully admitted aliens. E.g., *Mathews* v. *Diaz*, 426 U.S. 67 (1976); *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). This is because "Congress and the President have broad power over immigration and naturalization which the States do not possess," *Hampton*, p. 95, and because state discrimination against legally resident aliens conflicts with and alters the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948). However, the same cannot be said when Congress has decreed that certain aliens should not be admitted to the United States at all.]

excluding illegal alien residents of a state from such programs so as to preserve the state's finite revenues for the benefit of lawful residents.[166]

The Court maintains -- as if this were the issue -- that "barring undocumented children from local schools would not necessarily improve the quality of education provided in those [457 U.S. 252] schools."[167] However, the legitimacy of barring illegal aliens from programs such as Medicare or Medicaid does not depend on a showing that the barrier would "improve the quality" of medical care given to persons lawfully entitled to participate in such programs.[168] Modern education, like medical care, is enormously expensive, and there can be no doubt that very large added costs will fall on the State or its local school districts as a result of the inclusion of illegal aliens in the tuition-free public schools. The State may, in its discretion, use any savings resulting from its tuition requirement to "improve the quality of education in the public school system, or to enhance the funds available for other social programs, or to reduce the tax burden placed on its residents; each of these ends is 'legitimate.'" The State need not show, as the Court implies, that the incremental cost of educating illegal aliens will send it into bankruptcy, or have a "'rave impact on the quality of education,'" that is not dispositive under a "rational basis" scrutiny.[169] In the absence of a constitutional imperative to provide for the education of illegal aliens, the State may "rationally" choose to take

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[166] *Mathews* v. *Diaz*, 426 U.S. p. 80; see also n. 7.

[167] Ibid., p. 229. 458 F.Supp. 569, 577 (ED Tex.1978).

[168] [The District Court so concluded primarily because the State would decrease its funding to local school districts in proportion to the exclusion of illegal alien children. 458 F.Supp. p. 577.]

[169] [This "rational basis standard" was applied by the Court of Appeals. 628 F.2d 448, 458-461 (1980).]

advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own lawful residents, excluding even citizens of neighboring States.[170]

Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them. But that is not the issue; the fact [457 U.S. 253] that there are sound policy arguments against the Texas Legislature's choice does not render that choice an unconstitutional one.[171] II

The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem.[172] Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which, in the long run, tends to contribute to the weakening of our political processes.[173]

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[170] [I assume no Member of the Court would challenge Texas' right to charge tuition to students residing across the border in Louisiana who seek to attend the nearest school in Texas.]

[171] [In support of this conclusion, the Court's opinion strings together quotations drawn from cases addressing such diverse matters as the right of individuals under the Due Process Clause to learn a foreign language, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); the First Amendment prohibition against state-mandated religious exercises in the public schools, Abington School District v. Schempp, 374 U.S. 203 (1963); and state impingements upon the free exercise of religion, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). However, not every isolated utterance of this Court retains force when wrested from the context in which it was made.]

[172] *Lindsey v. Normet*, 405 U.S. p. 74. See *Reynolds v. Sims*, 377 U.S. 533, 624 625 (1964) (Harlan, J., dissenting).

[173] [Professor Bickel noted that judicial review can have a "tendency over time seriously to weaken the democratic process." A. Bickel, The Least Dangerous Branch 21 (1962). He reiterated James Bradley

Congress, "vested by the Constitution with the responsibility of protecting our borders and legislating with respect to aliens,"[174] bears primary responsibility for addressing the problems occasioned by the millions of illegal aliens flooding across our southern border. Similarly, it is for Congress, and not this Court, to [457 U.S. 254] assess the "social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[175] While the "specter of a permanent caste" of illegal Mexican residents of the United States is indeed a disturbing one, it is but one segment of a larger problem, which is for the political branches to solve. I find it difficult to believe that Congress would long tolerate such a self-destructive result -- that it would fail to deport these illegal alien families or to provide for the education of their children. Yet instead of allowing the political processes to run their course -- albeit with some delay -- the Court seeks to do Congress' job for it, compensating for congressional inaction. It is not unreasonable to think that this encourages the political branches to pass their problems to the Judiciary. (end of BURGER, J., dissenting.)

Thayer's observation that "the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility." Ibid., p. 22 (quoting J. Thayer, John Marshall 106-107 (1901)]

[174] Ibid., p. 237 (POWELL, J., concurring).

[175] Ibid., p. 221

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BIOGRAPHICAL SKETCH

Rose Alvine Raska is a product of Florida schools beginning with the first grade. She graduated from South Dade High School in Homestead, Florida, in 1966. She then earned a Bachelor of Arts at the University of South Florida in 1970. Her master's degree, 1975, came from the University of Central Florida and her education specialist degree, 1996, from the University of Florida.

She is employed by the Seminole County Public School system as the school-to-work coordinator and the district's guidance and career development coordinator, representing seven high schools and 59,000 K-12 students. She is actively involved in workforce development and strives for all students to learn about the myriad of career and educational opportunities available to them. Rose has worked full-time during the pursuit of this Doctor of Philosophy degree.

Rose taught elementary education for three years and then began 30 years of educational counseling experience (middle school, high school and post-secondary) in the public school arena.

Her mother, Germaine G. Bourque Raska, inspired Rose to be a lifelong learner. Rose has five brothers and sisters, all of whom are college educated. Two are certified public accountants with degrees from Florida state universities.

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

David S. Honeyman, Jr., Chair
Professor of Educational Leadership, Policy, and Foundations

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

M. David Miller
Professor of Educational Psychology

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.

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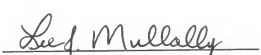
Professor of Educational Leadership, Policy, and Foundations

I certify that I have read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a dissertation for the degree of Doctor of Philosophy.



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This dissertation was submitted to the Graduate Faculty of the College of Education and to the Graduate School and was accepted as partial fulfillment of the requirements for the degree of Doctor of Philosophy.

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